NO. 76-5344

In THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

United States ex rel.
JAMES R. MOORE,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner James R. Moore respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the denial of his Petition for a writ of Habeas Corpus.

OPINIONS BELOW

Petitioner was denied a writ of Habeas Corpus by the United States District Court for the Northern District of Illinois on June 5, 1975; on April 27, 1976, the Court of Appeals for the Seventh Circuit affirmed the judgment in an "Unpublished Order" (Appendix C, attached hereto).

The Illinois Supreme Court had affirmed Petitioner's conviction on April 6, 1972, in People v. Moore, 51 Ill. 2d 79, 281 N.E. 2d 294 (1972).

JURISDICTION

On April 27, 1976, the United States Court of Appeals for the Seventh Circuit entered an "Unpublished Order" affirming the judment of the United States District Court for the Northern District of Illinois, Eastern Division, denying without a hearing, a Petition for a Writ of Habeas Corpus.

On June 10, 1976, the Petition for Rehearing En Banc was denied by the United States Court of Appeals for the Seventh Circuit.

The statutory provision believed to confer jurisdiction on this is 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Was the petitioner denied due process when, at Petitioner's pretrial hearing the prosecuting witness was allowed to view Petitioner for the first time since the alleged rape, even though Petitioner was not represented by counsel?

2. In addition to denying Petitioner Equal Protection of the laws, did the trial court's refusal to provide appointed counsel with transcripts of the confrontation proceeding and the preliminary hearing, also deprive Petitioner of the effective assistance of counsel?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

28 U. S. C. 2254

Nature of the Case

In a four-count complaint, Petitioner James R. Moore was charged with rape, robbery, burglary, and deviate sexual assualt in December of 1967. The complaint was signed on December 12, 1967, by one Marilyn Miller, the only witness to the occurrence. Immediately thereafter, Petitioner appeared in court and was identified by Ms. Miller as the assailant. After a preliminary hearing in which Ms. Miller was the principal witness for the State, Petitioner was indicted, and counsel was appointed for him. After a trial by jury, Petitioner was found guilty on all charges, and the trial court imposed three concurrent sentences of 30 to 50 years and one of 5 to 10 years. The Illinois Supreme Court affirmed the conviction, and the United States District Court for the Northern District of Illinois denied a petition for a writ of Habeas Corpus without a hearing. The United States Court of Appeals for the Seventh Circuit, in an "Unpublished Order," affirmed the District Court's decision, and denied a petition for Rehearing en banc.

IDENTIFICATION PROCEDURE

At Petitioner's first court appearance, he was not represented

by counsel, and the following occurred:

The Clerk: James Raymond Moore.

The Court: Are you James Raymond Moore?

Mr. Moore: Yes, sir.

The Court: You're charged with rape and deviate sexual assualt. Are you ready for hearing? Is Marilyn Miller here?

Miss Miller: Here.

Mr. Walsh (Assistant State's Attorney): This is an allegation of rape and deviate sexual assualt. It's a home invasion of an apartment in Hyde Park . . . Do you see the man in Court today that committed these acts upon your person?

Miss Miller: Yes.

Mr. Walsh: Will you point to him?

Miss Miller: There. (Indicating James R. Moore) (Appendix B, p. 2)

The above in-court showup was the complaining witness' [illegible] portunity to view any person suspected of having assualted her. She had no further opportunities to view suspects before Petitioner's preliminary hearing. At that hearing, she again identified Petitioner. But it was not until after Petitioner's third time in court that he, an indigent, was appointed counsel.

The rape for which Petitioner was arrested took place at about noon on December 14, 1967, in a darkened bedroom. An unknown assailant entered the room, awakening the sleeping complainant, who testified that she saw the assailant's face for only ten or fifteen seconds. (Tr. 265)* This 10 to 15 second viewing formed the basis for the general description of a masked assailant which Ms. Miller gave the police shortly after the occurrence. One of the first officers to whom she spoke testified that Ms. Miller never mentioned having seen the assailant at any time prior to this ten-to-fifteen-second viewing. (Tr. 331)

However, some two days later, Ms. Miller gave a new, more detailed description to the police, alleging that the assailant was over 6 feet tall, weighing more than 200 pounds, and wore a beard. (Tr. 150) This augmented description stemmed from Ms. Miller's revelation that she had seen a man fitting that description at a restaurant-bar the

*The designation Tr. now [illegible] hereinafter refers to the Transcript of the State proceedings had in [illegible]ctment Number 68-549 in the Circuit Court of Cook County, Criminal Div[illegible]on.

night before the occurrence. So, although she did not inform the police of this immediately, her testimony at the identification suppression hearing indicated that she had met the Petitioner on a previous occasion (Tr. 115), but had not given him her name or address (Tr. 274).

Based on the revised description, police officers showed Ms. Miller three photographs, only one of which depicted a bearded man, the Petitioner. Notwithstanding Ms. Miller's refusal to pick out any one of the three photographs, police arrested James R. Moore on December 20, 1967.

The complaint which charged Petitioner with the alleged crimes was not signed at the time of his arrest. Instead, immediately before Petitioner was to appear in court, the police directed Marilyn Miller to sign a complaint which clearly named James Moore as the defendant. When she questioned this procedure, the detective told her that "it made no difference." (Tr. 287-288)

Additionally, Ms. Miller testified that she was sitting in the courtroom, expecting to make an identification when Mr. Moore's name was called. (Tr. 287)

The bailiff called Petitioner's name, and Ms. Miller recognized the name from the complaint she had just signed. (Tr. 287) Then, the judge stated Petitioner's name and quickly mentioned Marilyn Miller's name. Finally, the prosecutor even motioned to Ms. Miller to approach the bench. (Tr. 280) Ms. Miller testified that she was able to identify Petitioner not by seeing him walk into the courtroom, but because she recognized his name. (Tr. 98)

Besides the court personnel and the prosecutor, the only persons present at the bench were Petitioner, his wife, and the complaining witness. (Tr. 80-89) Thus, Petitioner was the only man present who could possibly have been identified as the assailant, and Ms. Miller did so identify him. Subsequently, a preliminary hearing was held, and the court found probable cause, based solely on Marilyn Miller's identification testimony.

The prosecution strengthened the impact of its suggestive identification procedure by making untrue statements at the showup. While asking the court for a continuance, the State's Attorney made the following, wholly unsubstantiated remarks: 4

> Mr. Walsh: There's further investigation being conducted of prints being found on the scene . . . Taken from (the complainant) was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. (Appendix B, p. 2; emphasis supplied.)

As the order of affirmance entered by the Court of Appeals points out, the emphasized portions of the prosecutor's comments were not true. Furthermore, defense counsel who represented Petitioner at trial -- but who was not appointed until April, 1968 -- had no knowledge that the remarks were made, nor that they were immediately followed by the prosecutor's elicitation of an identification by the witness.*

THE DENIAL OF THE TRANSCRIPTS OF THE PRE-TRIAL HEARINGS

On February 5, 1968, Marilyn Miller testified as the only State's witness in Petitioner's preliminary hearing. At the hearing, she made a second identification of Petitioner which could only have been based on the prior in-court showup. Also her testimony about the occurrence embodied inconsistencies as to the lighting conditions at the time of the assault.**

At this hearing, Petitioner was not represented by his subsequently-appointed counsel. Nevertheless, when counsel made repeated requests for copies of the transcript of the proceedings, the trial court refused to provide him with them. (Tr. 9 - 11)

Appointed counsel made the first request before trial, reminding the Court that Petitioner was indigent and could not afford to pay for the transcript. Upon denial, he then filed a formal written motion before trial. (Respondent's Exhibit B, (Tr. 9 - 11) C-37, C-38)

*(R. 21, Appendix A, Record submitted to the Court of Appeals for the Seventh Circuit).

**Complainant testified at the preliminary hearing that the assault took place in mid-day in a room darkened by a quilt hanging over the window. However, she also testified that "it was night, as clear as it could be, but . . ." (From page 145 of the official Abstract of Record filed in this cause in the Supreme Court of Illinois, No. 42484.)

Counsel renewed his request at trial, following the complainant's testimony. (Tr. 254-260) Again, the court refused to furnish the transcript, stating that under Illinois law, Petitioner was not entitled to it, nor was the State obligated to produce a copy of it. (Tr. 254-260)

In a final effort, appointed counsel raised this issue both orally and in writing, in post-trial motions. He further pointed out that while defense counsel had been prohibited from using the preliminary hearing transcript, the court and prosecutor had themselves seen a copy of it. Nonetheless, the trial court asserted both that any possible error flowing from the denial was harmless, and that counsel had not even requested the transcript. (Tr. 675-698)

When Petitioner appealed directly to the Illinois Supreme Court, the Court found that the denial of the transcript had indeed deprived him of Equal Protection of the laws. However, the Illinois Supreme Court concluded that the error was harmless. (People v. Moore, 51 Ill. 2d 79, 281 N. E. 2d 295 (1972).

REASONS RELIED ON FOR ALLOWING THE WRIT

1. The photographic and corporeal identification procedures employed by the State were so highly suggestive as to violate the Sixth and Fourteenth Amendments.

The in-court showup to which Petitioner was subjected without benefit of counsel deprived him of due process and of his rights under the Sixth Amendment.

In this case, the complaining witness had had an extremely limited opportunity to view the actual assailant at the time she was raped. Her uncontroverted testimony itself established that she saw a man with a bandana covering the lower half of his face, in a darkened room, for a total of ten to fifteen seconds. Yet her memory was unaccountably refreshed several days hence when she went to view suspects' pictures. Only then did she see fit to inform police that she had seen a man whom she believed to be the assailant on an earlier occasion.

The complainant's delayed recollection of Petitioner gave the police a chance to search their files for a single picture of a heavy-set black man with a beard. The record discloses nothing to explain

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Ms. Miller's thought process in deciding Petitioner was her assailant. But it does indicate that she was not positive of her identification until after police had prompted her with the complaint-signing procedure. (Tr. 98)

And even though only a week had passed between the alleged rape and the confrontation, the police and prosecutor had made it impossible for Marilyn Miller not to identify the man they had decided was the assailant. They were aware of her uncertainty, at the police station (Tr. 156), and later outside the courtroom when she questioned the method of signing a complaint before she had viewed the person named therein. (Tr. 287, 288) But their concerted efforts were designed to remove that uncertainty: she was shown Petitioner's name, and told to approach the bench when she heard it called, and was finally even motioned up to the bench.

When she heard the name that she recognized, the complainant had no other choice but to point out Petitioner. The suggestiveness was exacerbated by the following facts: Petitioner was the only person who entered the room from another door. He was the only black man in the room besides a uniformed bailiff. And he was therefore the only person who appeared to be the defendant in the case.

This confrontation procedure could not have been more suggestive or more prejudicial to Petitioner, yet it was conducted in a court of law, at a time when Petitioner was totally vulnerable because he had no counsel. The State's behavior in the instant case is exactly the sort which this Court has condemned in its decisions of Unites States v. Wade, 288 U. S. 218, 18 L. Ed. 2d 1149 (1967), Gilbert v. California, 288 U. S. 263, 18 L. Ed. 2d 1178 (1967), and Stovall v. Denno, 288 U.S. 293, 18 L. Ed. 2d 1199 (1967).

U. S. v. Wade, supra., held that counsel is required at pre-trial confrontations, and that a court must scrutinize any such procedure to determine whether counsel's presence was necessary to protect the right to a fair trial. Gilbert v. California, supra., decided the same day as Wade established that a tainted identification procedure could not be the basis for subsequent identifications unless it was supported by an independent source.

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The procedure currently under discussion began with a suggestive photographic show-up. It continued with a patently improper courtroom confrontation. And it ended in a probable cause finding which rested on the treacherous ground created by these unfair proceedings. The independent source for the identification is the ten to fifteen second viewing of a masked assailant, in an unlit room.

Stovall v Denno, supra., and Neil v. Biggers, 409 U. S. 188, 34 L. Ed. 2d 401 (1972), delineated the rule which the courts should follow in determining whether, in the totality of circumstances, a defendant was denied due process by an unnecessarily suggestive show-up. Considering the factors outlined in Neil v. Biggers, supra., it is quite evident that the methods employed in the instant case created a substantial likelihood of misidentification.

First of all, the complainant had fifteen seconds, [illegible] see only part of the assailant's face; this is not sufficient opportunity to create certainty in the witness' mind. Marilyn Miller admittedly lacked the requisite certainty throughout the identification procedures. Furthermore, it was never explained why she was so vague only moments after the assualt, but had picked out a specific individual to describe as the assailant after days had passed.

It is unquestionable that during the attack, when the complainant was forced to lie on her stomach (Tr. 104), her attention was not focused on the assailant's face. Thus the second Neil factor is missing in this case.

As to the accuracy of the prior description of the assailant, Ms. Miller was able to supply only the broadest information. She told the first police officer that the suspect was a black man, 20 or 25 years old, about six feet tall, and wearing a yellow sweater. The police officer himself filled in a weight of 185 pounds. (Tr. 330) Petitioner was over 6'2" in height, weighing some 240 pounds, and wore a beard and moustache; but complainant did not mention these distinguishing features when she gave her on-scene description of the assailant.

The fact that Marilyn Miller was not certain that Petitioner was the man who had attacked her is undisputed. She admitted at the trial that her certainty at the time of the confrontation derived solely from the police officer's familiarizing her with Petitioner's name. (Tr. 287)

The complainant saw Petitioner walk into the room, and still she believed he was the assailant only because she knew his was the name on the complaint she had signed.

Given these potentials of suggestibility, Ms. Miller's testimony, which occurred long after the tainted identification proceeding, cannot be a sufficient independent source for any identification. The reliability of the fact-finding process was further decreased because defense counsel was not able fully to cross-examine this eye-witness as to the suggestive impact of the confrontation proceeding. Hence, even after subjecting the facts of Petitioner's situation to the close scrutiny required by Stovall and Neil, it remains clear that due process was denied here.

Kirby v. Illinois, 406 U. S. 682, 32 L. Ed. 2d 411 (1972), held that the right to counsel does not attach until judicial criminal proceedings are initiated, so that the exclusionary rule would not apply to an identification based on a police station showup which took place before formal proceedings had begun. The rule in Kirby does not prevent Petitioner in the instant case from raising the suggestive showup issue. Formal court proceedings against him had not only begun at the time of the uncounseled confrontation, but the showup took place in the very midst of these proceedings.

Petitioner's case is an excellent example of misbehavior on the part of police and prosecutor, highlighted by the use of a courtroom as the setting for the improper conduct. Such a blatant misuse of the courts must at least constitute a denial of due process, therefore the later identifications which flowed from the procedure should have been excluded. Accordingly, this petition should be granted so that this Court may make the conclusive determination.

2. In addition to denying petitioner equal protection of the laws, did the trial court's refusal to provide appointed counsel with transcripts of the confrontation proceedings and the preliminary hearing, also deprive petitioner of the effective assistance of counsel?

Petitioner's trial counsel was appointed for him long after his first two court appearances. However, these pre-trial proceedings not only contained crucial testimony of the sole eyewitness, Marilyn Miller, but also critically suggestive in-court colloquy by the prosecution. Nonetheless, the trial Judge repeatedly refused to provide appointed

counsel with a copy of the trial transcripts for use in the trial. This erroneous denial prevented defense counsel not only from conducting effective preparation and potential cross-examination but also denied appointed counsel any real opportunity to elicit and explore the "totality of circumstances" of the concededly suggestive initial identification. The defense attorney's handicap in turn deprived Petitioner of the effective assistance of counsel.

Without the transcript of the initial compelled in-court identification, appointed counsel had no knowledge of the prosecutor's untrue statements about the recovery of her property, nor of the circumstances under which they were made.

Without such knowledge, petitioner's counsel was effectively de-
prived of the opportunity to pursue their suggestive impact either at the pre-trial hearing held to suppress the identification or at the trial in the state proceedings. The effect of such denial is attested to in the district court record, (R. 21, Appendix A), wherein trial counsel in an affidavit specifically stated that at the time of petitioner's trial, he (appointed counsel) had no knowledge of the prosecutor's untrue in-court remarks on December 21, 1967. He further had no doubt or reservation about stating that the lack of such knowledge not only seriously and substantially prejudiced his opportunity to demonstrate more suggestion and influence in Ms. Miller's identification but that without question with the transcript he would have been able to demonstrate more suggestion in such identification.

At Petitioner's preliminary hearing, a critical stage of the criminal proceedings, the complainant was the only State's witness to testify. Her testimony was essential for defense counsel's use for three reasons: First of all, it was founded on the suspect identification procedures employed by the prosecution. Secondly, the testimony contained statements which went directly to the question of her ability to observe the assailant. Thirdly, the testimony contained statements which contradicted her trial testimony.

Undeniably, these three elements in the preliminary hearing transcript bore directly on the credibility of the only occurrence witness in this case. Defense counsel could have used the transcript at trial to effectuate cross-examination of this witness. But since appointed counsel was prohibited from seeing a copy of the transcript, he did not even

know the extent of the damage contained therein. Far less could he provide effective assistance to his client.

Every time that the trial judge refused to give Petitioner's appointed lawyer access to the preliminary hearing transcript, he was usurping counsel's responsibility to make decisions as to the transcript's value. The trial court prevented defense counsel from using his own judgment regarding preparation and cross-examination, even though it was counsel's duty to his client to make these determinations. This behavior not only denied Petitioner equal protection, as the Illinois Supreme Court held, but also deprived him of effective representation.

It is not enough for the courts simply to appoint attorneys for defendants who cannot afford to hire their own. The right to counsel in this country is clearly the right to effective assistance of counsel. Gideon v. Wainwright, 372 U. S. 355, 83 S. Ct. 792 (1963); Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932); see Argersinger v. Hamlin, 407 U. S. 25, 92 S. Ct. 2006 (1972). The trial court in the case at bar ignored this precept, and deprived Petitioner of his rights under both the Fourteenth and Sixth Amendments of the United States Constitution.

WHEREFORE, Petitioner now requests the Supreme Court of the United States to allow a writ of certiorari to issue to the United States Court of Appeals for the Seventh Circuit to review its judgment affirming the denial of Petitioner's writ of habeas corpus.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. 2254(a)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,
Petitioner,

—*v.*—

ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1976
CERTIORARI GRANTED JANUARY 17, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

—*v.*—

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 29, 1973 Leave Granted to Petitioner James R. Moore, *pro se*, to File Petition for writ of Habeas Corpus *In Forma-Pauperis*

October 19, 1973 Petitioner's *pro se* Motion for Search Warrant docketed

March 20, 1974 Order Dismissing Petitioner's *pro se* Petition for Writ of Habeas Corpus for Failure to Exhaust State Remedies, with Memorandum of Decision Attached

April 10, 1974 Petitioner James R. Moore's *pro se* Application for Certificate of Probable Cause, Notice of Appeal *in Forma Pauperis*

May 6, 1974 Denial of Petitioner's *pro se* Application for Certificate of Probable Cause

May 10, 1974 Certification and Transmittal of Record to United States Court of Appeals, Seventh Circuit

August 7, 1974 Order Granting the Petitioner's Certificate of Probable Cause and Leave to Appeal *In Forma Pauperis*; Vacating the District Court's Decision; and Remanding for All Necessary Proceedings Consistent with the Court of Appeals' Opinion

November 1, 1974 Petitioner's Memorandum of Law

November 8, 1974 Order Entered for State to Show Cause Why Relief Should Not be Granted

November 18, 1974 Petitioner's Motion for Appointment of Counsel and for Extention of Time

November 20, 1974 Petitioner's *pro se* Motion for Leave to Amend the "Memorandum of Law"

December 24, 1974 Order Granting Petitioner's Motion for Ten Days in which to Amend Memorandum of Law and for Thirty Days for the State to Reply

January 8, 1975 Petitioner's Amended Memorandum of Law in Support of Constitutional Issues Raised in Petitioner's Habeas Corpus Petition

February 3, 1974 Respondent's Motion to Dismiss or for Summary Judgment

May 8, 1975 Order Entered, Finding that the State Appellate Defender's Assumption of the Responsibility of Representing Petitioner Moore Removed the Necessity of the Motion for Appointment of Counsel and that the Amended Memorandum of Law Satisfied the Need for any further Amendments

June 5, 1975 Order Granting Respondent's Motion for Summary Judgment, with Memorandum of Decision Attached

July 7, 1975 Order Granting Petitioner's Motions for Certificate of Probable Cause, and for Leave to Appeal *in Forma Pauperis*

August 4, 1975 Appeal Docketed in the United States Court of Appeals for the Seventh Circuit

September 9, 1975 Petitioner-Appellant's Brief Filed

October 16, 1975 Respondent-Appellee's Brief Filed

October 30, 1975 Petitioner-Appellant's Reply Brief Filed

January 20, 1976 Oral Argument Held Before Seventh Circuit Judges Hastings, Cummings and Bauer

April 27, 1976 "Unpublished Order" Entered, Affirming the Judgment of the District Court

May 11, 1976 Petition for Rehearing En Banc Filed in the Seventh Circuit

June 10, 1976 Order Denying the Petition for Rehearing En Banc

September 8, 1976 Petition for a Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* Docketed in the United States Supreme Court

January 17, 1977 Order Granting Motion for Leave to Proceed *In Forma Pauperis* and Petition for a Writ of Certiorari in the United States Supreme Court

IN THE
SUPREME COURT OF ILLINOIS

No. 42484

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

v.

JAMES R. MOORE, DEFENDANT-APPELLANT

January 28, 1972

GOLDENHERSH, Justice.

Defendant, James R. Moore, was found guilty by a jury in the circuit court of Cook County of the offenses of rape, deviate sexual assault, burglary and robbery, and sentenced to concurrent sentences of not less than 30 nor more than 50 years on each of the rape, burglary and robbery convictions, and not less than 5 nor more than 10 years on the conviction for deviate sexual assault.

The complaining witness testified that on December 14, 1967, at approximately noon, she was awakened from a nap by noise in her apartment. As she opened her eyes, she saw a man standing in her room. She screamed, and the man leaped upon her and began choking her. He turned her over on her stomach, removed part of her clothing and covered his face with a bandanna. He forced her to perform an act of oral copulation, and then raped her. He left the apartment taking with him several items of personal property including two musical instruments.

[1, 2] As ground for reversal defendant contends first that he was denied equal protection of the law when the trial court denied his request for a transcript of the preliminary hearing at which the complainant testified. The record shows that at a motion hearing approximately two months prior to trial defense counsel requested a copy of the transcript of the preliminary hearing. The trial court stated that he was not entitled to the transcript but that the "preliminary hearing statements" would be preserved and would be available "for you and

for your use at the time of trial." At the trial, following the testimony of the complaining witness, defense counsel again requested the transcript. It was determined that the testimony had not been transcribed and the court ordered counsel to proceed without it.

Citing Roberts v. LaValle, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41, defendant argues that the refusal of the transcript violated his constitutional rights for the reason that if he were not indigent he could have ordered the testimony transcribed. The people contend that *Roberts* is not applicable for the reason that the New York statute involved in *Roberts* specifically provides for furnishing the transcript upon payment of the statutory fee and there is no comparable statute in Illinois. Defendant argues, and we agree, that the distinction for which the People contend is not valid for the reason that under the provisions of section 5 of the Court Reporters Act (Ill.Rev.Stat.1969, ch. 37, par. 655) a defendant able to pay the fee would have been able to obtain the transcript. We hold that under the authority of *Roberts* the cases therein cited, and Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), the denial of the transcript deprived defendant of equal protection of the laws.

When the testimony adduced at the preliminary hearing was transcribed is not shown, but the transcript is included in the record on appeal. Citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, defendant argues, correctly, that for error of constitutional dimensions to be deemed harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. We have examined the testimony at the trial, the testimony at the hearing on defendant's motion to suppress the identification of the defendant by the complaining witness, and the transcript of the preliminary hearing, and fail to find any testimony for which the transcript could have been used for purposes of impeachment. Defendant argues that in the hearing to suppress, and at trial, the complaining witness testified the assault occurred shortly after noon and that at the preliminary hearing she testified "it was

night." Taken out of context that statement might appear to support defendant's contention that there is a discrepancy in her testimony, but read with her other testimony at the preliminary hearing it is obvious she meant her room was darkened because the windows were covered. We conclude that the denial of the transcript was harmless beyond a reasonable doubt.

[3] Defendant contends next that the trial court committed reversible error in refusing to call the complainant as the court's witness in the hearing on the motion to suppress the identification. He argues, without pointing out any specific instance, that the ruling deprived him of the opportunity to impeach her with her prior statements. The one specific reference in the argument is to a police report which obviously could not be used to impeach the complainant. Under the circumstances shown in the record we cannot say that in denying the request the court abused its discretion.

[4] Defendant contends next that the trial court erred in unduly limiting his cross-examination of a police officer witness at the hearing to suppress. The record shows that although the court sustained the People's objection to a question, the information was elicited in response to another question propounded very shortly thereafter. Defendant has not demonstrated, nor do we perceive, in what manner the ruling complained of was prejudicial.

[5-7] The defendant complains of the trial court's refusal to order the court reporter, during cross-examination of the complainant at the trial, to read back parts of her testimony on direct examination. He argues that the prior answers were proper impeachment, and the court's ruling was error. Defendant has confused allegedly contradictory testimony at the trial with inconsistent prior statements, which, not having been heard by the trier of fact, may be shown for purposes of impeachment. We find no authority to support defendant's contention, and the trial court did not err in its ruling. The record also shows that although he did not consider it necessary to do so, the trial court, at the close of the People's case, recalled the complainant and permitted

defendant to interrogate her and show that there was a discrepancy in her testimony regarding the selection of the photographs from which the identification was made. Assuming, *arguendo*, that the ruling of which defendant complains was error (and we hold it was not), under the circumstances shown it was rendered harmless.

[8] Defendant contends that he was deprived of his sixth amendment right to confront the witness. This argument is based on the alleged refusal of the People to furnish defendant with the complainant's correct address. He argues that failure to furnish him with her address in California where she testified she was living at the time of trial deprived him of his right "to investigate her very transient existence during this time in order to investigate her reputation and any other strange activities which might be admissible for the purpose of affecting her credibility." The record shows that defendant was given the only two addresses at which she lived in Chicago and that the court took great pains to assure her availability for interview by defense counsel. She testified she had lived in California for only six days and except for the speculative suggestion that such information might have led to the discovery of information not elicited in the course of her lengthy and repetitive cross-examination, defendant has failed to show how he was in any manner prejudiced by the failure to know her California address. The contention is wholly without merit.

[9] Defendant contends next that the identification of defendant is the product of a "suggestive photographic identification procedure and a suggestive corporeal identification procedure." In support of this contention defendant argues that the identification of the defendant by the complainant is based upon an improperly suggestive procedure employed in the course of the complainant's examination of photographs furnished by the police and in the manner of her viewing the defendant at the preliminary hearing.

The complainant testified that when she was awakened she had been sleeping for approximately 45 minutes, that the only light in her room came through a window which was covered by a quilt, that the only time she saw de-

fendant's face was for a period of 10 or 15 seconds before he covered it with a bandanna. At no subsequent time while he was in her apartment could she see his face. Upon his departure she called the police and when they arrived at her apartment she told them she had been raped. She described her assailant as a negro male, 20 to 25 years old, 185 lbs., six feet tall, dark complected and wearing a yellow sweater. She was taken to the emergency room at Billings Hospital and examined by a physician. After having been examined at the hospital, complainant described her assailant to other police officers as weighing over 200 lbs. with facial hair around his mouth and chin. At the time of the occurrence defendant was 6 ft. 2 inches tall, weighed 240 lbs, and had a beard.

Two days later, from over 200 photographs, complainant elected several that resembled her assailant. A few days later she tentatively identified the photograph of defendant from a group of about 10 photographs, but stated she could not be certain unless she saw him again. She was then requested by a police officer to sign a criminal complaint naming defendant. When defendant was brought into court for a preliminary hearing, complainant was also in the courtroom. After defendant's name had been called and he stepped forward before the bench, complainant identified him as her assailant.

The complainant also testified that on the evening preceding the day of the occurrence she saw defendant in Smedley's Restaurant, located near her apartment and that defendant had engaged her in conversation. Defendant argues correctly that none of the police reports contain any indication that complainant had told them she had seen defendant on the preceding evening but the complainant and one officer testified that she had given the police this information after she returned from her examination at the hospital.

The record does not support defendant's contention that the examination of the photographs was conducted in a manner to suggest the selection of any of the 200 individuals as her assailant and the fact that she was permitted to see the defendant at the preliminary hear-

ing does not, under the circumstances shown, taint her identification. The record shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph.

[10] Defendant contends next that the evidence is not sufficient to prove him guilty beyond a reasonable doubt. In addition to the testimony heretofore reviewed the record shows that after her assailant left the apartment complainant found on the floor of her bedroom a checkbook which was the property of a friend of defendant. Inside the checkbook was a letter which the owner testified she had written on December 12, 1967, but had not mailed. She testified further that on December 13, 1967, she had given the defendant the keys to her apartment and asked him to remove some personal property which he had left there. Defendant stipulated that he had removed the letter from the friend's apartment.

At the time of defendant's arrest the police searched his apartment. One of the officers testified that he had recovered the items stolen from complainant. On cross-examination, however, he testified he had no knowledge that complainant had ever identified them as hers, nor did complainant testify that she was ever asked to identify them.

Two witnesses called on behalf of defendant testified that they were students with defendant at Roosevelt University and were with defendant in the university cafeteria at noon on December 14, 1967, discussing a program planned for the school on the next day, which was the day class let out for the Christmas vacation.

A friend of defendant and a waitress employed at Smedley's Restaurant both testified that on the night defendant spoke with complainant at Smedley's they remembered defendant's searching on the floor of the restaurant for an object he had lost and which he described as a "kind of a book."

Defendant argues that the alibi testimony was unimpeached and the loss of the checkbook at Smedley's satisfactorily explains its presence in complainant's apart-

ment. He argues further that the complainant did not have the opportunity to see her assailant in sufficient light or for a sufficient time to make a reliable identification and cites alleged discrepancies in her description and the failure of the police report to show any reference to her having seen him on the preceding evening. Upon review of the entire record we do not find the evidence so unsatisfactory as to raise a reasonable doubt of defendant's guilt, and absent such finding we will not disturb the verdict and judgment.

[11] Defendant contends next that he was denied equal protection of law when he was denied the use of the police department's arrest records of prospective jurors. The record does not satisfactorily show that the State's Attorney was in possession of the information sought in defendant's motion but assuming, *arguendo*, that he was, it would have been no more available to an affluent defendant than to an indigent, and there is here no denial of equal protection.

Defendant contends next that improper argument and prejudicial conduct on the part of the State's Attorney denied him a fair trial. A detailed review of the contentions will be of no precedential value and it suffices to say that our examination of the record fails to persuade us that any of the conduct of which defendant now complains was so prejudicial as to require reversal.

[12] Finally defendant contends that because all of the charges arose out of one transaction, involving one victim, it was improper to impose more than one sentence. Each of the offenses of rape, robbery and burglary, although committed in the course of the same transaction, involves conduct clearly divisible from the conduct which constitutes the other offenses. With respect to the offenses of rape and deviate sexual assault, there is precedent for the imposition of separate sentences. (People v. Scott, 43 Ill.2d 135, 251 N.E.2d 190; People v. DeFrates, 395 Ill. 439, 70 N.E.2d 591.)

We find no reversible error and the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 73C 2222

August 29, 1973

PERSONS IN STATE CUSTODY

UNITED STATES OF AMERICA EX REL
JAMES RAYMOND MOORE 64142

—*vs*—

STATE OF ILLINOIS

1. Place of detention Statesville (ISP) Box 112 Joliet, Illinois 60434
2. Name and location of court which imposed sentence Circuit Court of Cook County—Chicago, Illinois
3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:
   (a) Indictment Number 68-549; Offense: Robbery, Burglary, Rape and Sexually
   (b) Deviate Assault
   (c) .....
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) Date August 23, 1968 30-50, 30-50, 30-50, and
   (b) 5-10 respectively.
   (c) .....
5. Check whether a finding of guilty was made
   (a) after a plea of guilty .....

   (b) after a plea of not guilty X-After a Plea of Not Guilty
   (c) after a plea of *nolo contendere* .....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury Jury
   (b) a judge without a jury .....
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. Illinois Supreme Court
      ii. United States Supreme Court
      iii. .....
   (b) the result in each such court to which you appealed:
      i. Judgment Affirmed
      ii. Petition for Certiorari Denied
      iii. .....
   (c) the date of each such result:
      i. January 28, 1972 Affirming Opinion filed, April 6, 1972 Judgment entered
      ii. November 6, 1972
      iii. .....
   (d) if known, citations of any written opinion or orders entered pursuant to such results:
      i. —— Ill. 2d ——, 281 N.E. 2d 294
      ii. Unknown
      iii. .....

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) THAT DENIAL OF PRELIMINARY HEARING TRANSCRIPT(S) WAS/IS A DENIAL OF PETITIONER RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW

(b) THAT IDENTIFICATION OF PETITIONER AS THE INDIVIDUAL WHO HAD COMMITTED AFOREMENTIONED CRIMES WAS NOT ONLY SUGGESTIVE BUT THE RESULT OF SUBSTANTIAL VIOLATIONS OF PETITIONER'S CONSTITUTIONAL RIGHTS

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) PETITIONER WAS DENIED AT THE TIME OF TRIAL THE TRANSCRIPT OF THE PRELIMINARY HEARING, PETITIONER WAS POOR AND UNABLE TO PAY FOR THE SAME, AND EVENTHO IT WAS PETITION FOR ON MORE THAN ONE OCCASION PRIOR TO AND DURING THE TRIAL IT WAS NOT PRODUCED UNTIL AFTER PETITIONER'S CONVICTION. HOWEVER, WHAT WAS PRODUCED THEN WAS ONLY A PARTIAL TRANSCRIPT, ONE OF THREE (THE LAST APPEARANCE PETITIONER HAD BEFORE THE LOWER COURT AND NOT THE INITIAL APPEARANCE WHERE PETITIONER WAS WITHOUT COUNSEL AND SUBSTANTIAL VIOLATIONS HAD

TAKEN PLACE. THAT THE COMPLETE TRANSCRIPT WAS DENIED THE TRIAL JUDGE, PETITIONER COUNSEL, AND THE APPEAL COURTS: THAT IT WAS NOT UNTIL PETITIONER COULD AFFORD TO PURCHASE THE LOWER COURT TRANSCRIPT DID HE RECEIVE THE COMPLETE TRANSCRIPT, AND THIS WAS AFTER THE TRIAL COURT JUDGE HAD VIEWED THE PARTIAL TRANSCRIPT, AND APPEAL HAD BEEN TAKEN AND DENIED.

(b) THAT PETITIONER'S IDENTIFICATION BOTH PHOTOGRAPHIC AND IN COURT WAS NOT ONLY SUGGESTIVE BUT THE IN COURT IDENTIFICATION WAS THE RESULT OF PERJURED TESTIMONY BY THE ASST. STATE ATTORNEY WHO KNOWINGLY, FALSELY STATED THAT STOLEN PROPERTY HAD BEEN RECOVERED FROM PETITIONER HOME. THIS STATEMENT WAS MADE PRIOR TO PETITIONER BEING IDENTIFIED BY THE COMPLAINANT, AND AFTER HEARING SUCH TESTIMONY COMPLAINANT THEN WAS CALLED UPON TO IDENTIFY PETITIONER AS HER ASSAILANT.

(c)

12. Prior to this petition have you filed with respect to this conviction:

(a) any petition in a state court under the Illinois Post-Conviction Hearing Act, Ill.Rev.Stat., ch. 38, sec. 122?

NO

(b) any petitions in a state court by way of statutory *coram nobis*, Ill.Rev.Stat., ch. 110, sec. 72?

NO

(c) any petitions in state or federal court for habeas corpus?

NO

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)?

NO

(e) any other petitions, motions or applications in this or any other court?

YES

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. A Motion in the Trial Court Challenging the Partial Preliminary Hearing Transcript as Being Falsified/Not Only Was it Incomplete But From the Information Supplied by Counsel it Was Deleted as Well with Crucial Testimony Being Taken Out of it.

ii. ---

iii. ---

iv. ---

(b) the name and location of the court in which each was filed:

i. Circuit Court of Cook County, 26005. California, Chicago, Illinois

ii. ---

iii. ---

iv. ---

(c) the disposition thereof:

i. "Taken Off Call" by the Trial Judge

ii. ---

iii. ---

iv. ---

(d) the date of each such disposition:

i. Oct. 1st. 1968

ii. ---

iii. ---

iv. ---

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None: the Motion I Filed Was a Continuation of the Trial Procedures

ii. ---

iii. ---

iv. ---

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? YES

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. 10(a); That Denial of Preliminary Hearing Record Denied Const. Rights.

ii. 10(b); That Identification was Suggestive

iii. ---

iv. ---

(b) the proceedings in which each ground was raised:

i. Direct Appeal to the Illinois Supreme Court

ii. Petition for Writ of Certiorari to United States Supreme Court

iii. ---

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) In both 10(a) and (b) the grounds were raised but owing to the continual denial of prelimi-

nary hearing transcript even after appeal had been taken certain crucial and supporting factors were not available; factor which support petitioner's claim of denial of due process and were not available until after petitioner had purchase the complete preliminary hearing transcript and after and appeal had been taken and denied on the partial record.

(b)

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? NO

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? YES

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Frederick F. Cohn 35 E. Wacker Drive Chicago Illinois 60601

ii. .....

iii. .....

(b) the proceedings at which each such attorney represented you:

i. At Trial

ii. On Direct Appeal to Illinois Supreme Court

iii. On Petition for Certiorari Before the US Supreme Court

19. If you are seeking leave to proceed in *forma pauperis*, have your completed the sworn affidavit setting forth the required information (see instructions, Page 1 of this form? YES

/s/ James R. Moore
Signature of Petitioner

STATE OF ILLINOIS)
) ss
COUNTY OF WILL)

James R. Moore, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ James R. Moore
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 28 day of August, 1973

/s/ Edwin J. Meyer
Notary Public

My commission expires
Nov. 14, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2222

UNITED STATES OF AMERICA EX REL
JAMES RAYMOND MOORE

v.

STATE OF ILLINOIS

MEMORANDUM OF DECISION

Petitioner is currently serving three sentences of thirty to fifty years and one sentence of five to ten years imposed by the Circuit Court of Cook County after a jury found him guilty of robbery, burglary, rape and deviate sexual assault. He has brought this petition for a writ of habeas corpus on the grounds that his constitutional rights were violated as the result of an improper identification and because he was only provided a partial transcript of his preliminary hearing.

This Court does not reach a decision on the merits of petitioner's contention. Federal habeas corpus is designed to provide a remedy for those who have been subjected to state prosecution and incarceration in violation of their federal rights. However, Section 2254 of Title 28 of the United States Code limits the issuance of the writ to those instances in which the petitioner has exhausted his state remedies or has clearly demonstrated the unavailability of state corrective processes. Any habeas corpus petitioner, therefore, must (1) have sought relief in each court of the state's hierarchy in which a remedy is currently available, and (2) show that precisely those points raised in federal court were previously raised in the state courts or may no longer there be raised. If either of these conditions remains unfulfilled, an application for a writ of habeas corpus must be denied.

In the case at bar, the petitioner has not filed any petition under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. Ch. 38, Sec. 122, which is currently available to him. In light of his failure to exhaust this available state remedy, the petitioner has not complied with the requirements set forth in 28 U.S.C. Sec. 2254.

Accordingly, his petition must be dismissed at this time for failure to exhaust state remedies. An appropriate Order will be entered.

/s/ William J. Lynch
Judge
United States District Court

DATED: March 20, 1974

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 25, 1974

Before HON. WILBUR F. PELL, JR., Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge

No. 75-1510

UNITED STATES OF AMERICA, EX REL.
JAMES RAYMOND MOORE, PETITIONER-APPELLANT,

vs.

STATE OF ILLINOIS, RESPONDENT-APPELLEE.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 73 C 2222

WILLIAM J. LYNCH, *Judge*

ORDER

Petitioner was found guilty, after a trial in state court, of robbery, burglary, rape and deviate sexual assault. His conviction was affirmed by the Illinois Supreme Court, and certiorari was denied by the United States Supreme Court.[1] *People* v. *Moore*, 51 Ill.2d 79, 281 N.E.2d 294 (1972), *cert. denied*, 409 U.S. 979. He then petitioned pro se for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court dismissed the petition and thereafter denied a certificate of probable cause on the ground that petitioner failed to pursue

[1] Petitioner was represented at all stages of his state proceedings by appointed counsel.

the remedy afforded by the Illinois Post-Conviction Hearing Act. Ill. Rev. Stat. ch. 38, §§ 122-1 *et seq.*

Petitioner now asks, also pro se, that we grant a certificate of probable cause, 28 U.S.C. § 2253, and leave to appeal in forma pauperis. He contends that each of the issues presented to the district court was decided in *People* v. *Moore*;[2] thus, the exhaustion requirement of § 2254 has been satisfied.

The grounds upon which petitioner seeks relief are not entirely clear when one considers only the petition for a writ of habeas corpus. In several documents filed after the district court rendered its decision,[3] however, petitioner plainly states that two grounds were presented. First is whether he "was denied equal protection when the trial court refused to furnish a transcript of the preliminary hearing at which the identification witness testified?" Second is whether his identification was "the product of a suggestive photographic identification procedure and a suggestive corporeal identification procedure?"

These two issues were expressly adjudicated by the Illinois Supreme Court in *Moore*.[4] In *United States ex*

[2] In his "Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis," which was filed in the district court, petitioner states that

> the same points raised in Federal District court were raised and adjudicated by trial court and State Supreme Court along with having been presented to the U.S. Supreme Court.
>
> . . . .
>
> [A] verbatim rendering of the questions presented to the trial court, state Supreme Court, and U.S. Supreme Court may not have been given to the Federal District court but the nature and substance of the questions were the same and that any verbatim differences is ascribed to petitioners laymanness.

[3] "Affidavit in Support of Application for Certificate of Probable Cause" (filed in this court); "Notice of Appeal: Motion to Proceed on Appeal in Forma Pauperis"; "Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis" (filed in the district court).

[4] The court in *Moore* held that denial of the transcript deprived petitioner of equal protection, but that the error was harmless. 51

rel. Adams v. *Pate*, 418 F.2d 815, 817 (7th Cir. 1969), this court stated:

> If the state's highest court has ruled on the federal question on direct review of the conviction, the petitioner [in a § 2254 proceeding] is not required to present the same claim in a post-conviction proceeding as well.

Accord, Hunter v. *Swenson*, 442 F.2d 625, 629 (8th Cir. 1971); *Williams* v. *Oriscello*, 441 F.2d 1113, 1114 (3d Cir. 1971); *Pleas* v. *Wainwright*, 441 F.2d 56, 57 (5th Cir. 1971); *Smith* v. *Peyton*, 408 F.2d 1009, 1010 (4th Cir. 1968). Consequently, petitioner has exhausted his state remedies with respect to both of the above issues.[5]

Both the transcript issue and the identification issue are alleged in the habeas corpus petition in terms which are broad enough to encompass facts which were not before the Illinois Supreme Court. Thus, the habeas petition indicates that petitioner did not receive three pre-

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Ill.2d at 81-82, 281 N.E.2d at 296. With respect to the identification issue, it ruled:

> The record does not support defendant's contention that the examination of the photographs was conducted in a manner to suggest the selection of any of the 200 individuals as her assailant and the fact that she was permitted to see the defendant at the preliminary hearing does not, under the circumstances shown, taint her identification. The record shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph.

51 Ill.2d at 86, 281 N.E.2d at 298.

[5] Under the circumstances of this case it is clear that petitioner may not take advantage of the Illinois Act. *See People* v. *Dale*, 406 Ill. 238, 244-45, 92 N.E. 2d 761, 765 (1950). It might properly be held, therefore, that petitioner has exhausted his state remedies because the only relief *arguably* available is not *in fact* available. *United States ex rel. Gates* v. *Twomey*, 325 F.Supp. 920 (N.D. Ill. 1971); *see United States ex rel. Allum* v. *Twomey*, 484 F.2d 740, 742-43 (7th Cir. 1973). We need not, however, rest our decision on this ground. *Compare United States ex rel. Crump* v. *Sain*, 264 F.2d 424, 426 (7th Cir. 1959).

liminary hearing transcripts whereas the Illinois Supreme Court reviewed only one of them.[6]

Accordingly, we grant the certificate of probable cause and leave to appeal in forma pauperis, vacate the district court's decision and remand for all necessary proceedings consistent with this opinion. See *Townsend* v. *Sain*, 372 U.S. 293; *Shelby* v. *Phend*, 445 F.2d 1326, 1327-1328 (7th Cir. 1971).

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[6] Petitioner alleges that he did not receive any transcripts until after his trial. However,

> what was produced then was only a partial transcript, one of three—the last appearance petitioner had before the lower court and not the initial appearance where petitioner was without counsel and substantial violations had taken place

He goes on to state that transcripts of these other hearings were not provided until after his state "appeal had been taken and denied."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 73 C 2222

April 7, 1975

UNITED STATES EX REL. JAMES RAYMOND MOORE,
PETITIONER,

vs.

THE STATE OF ILLINOIS, RESPONDENT.

APPENDIX A TO PETITIONER'S REPLY MEMORANDUM

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

AFFIDAVIT

I, FREDERICK F. COHN, being first duly sworn depose and say as follows:

1. That I am an attorney at law presently engaged in the private practice of law in Chicago, Illinois.

2. That on or about April 5, 1968, I was appointed by the Court as Counsel for James R. Moore in cause number 68-549 then pending in the Circuit Court of Cook County, Criminal Division entitled *People of the State of Illinois* v. *James R. Moore.*

3. That prior to such appointment, Mr. Moore was represented by other counsel and affiant did not represent James R. Moore at the preliminary hearing held in such cause.

4. That cause number 68-349 was tried before the Honorable Richard C. Fitzgerald in the Circuit Court of Cook County, Criminal Division.

5. That I was advised prior to the trial of such case by one of the two Assistant States Attorneys, Thomas Tully or Matthew Walsh, who were then assigned to prosecute criminal cases in Judge Fitzgerald's courtroom and who did prosecute Mr. Moore in the case, that the complaining witness, Marilyn Miller had examined the guitar and flute taken by the police from the home of James R. Moore on the night of his arrest. He was further advised that Marilyn Miller upon such examination, had stated that such items were not those taken from her apartment by her assailant the night of her alleged assault and were not hers.

6. That I have examined a copy of the Transcript of Proceedings occurring in James R. Moore's case on December 21, 1967 before the Honorable Daniel J. Ryan, a xerox copy of which is attached hereto.

7. That I had no knowledge of the fact that in such proceedings the assistant States Attorney stated in open court in the presence of the complaining witness that "When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day" nor did, I have any knowledge that such statements were immediately followed by the prosecutor's elicitation from her of an identification of James R. Moore as her assailant.

8. That I have no doubt or reservations about stating, upon my examination of the attached transcript that my lack of knowledge of the colloquy reported therein because of my requests for a transcript were refused, seriously and substantially prejudiced the opportunity to demonstrate more suggestion and influence upon Marilyn Miller's identification of James B. Moore than was demonstrated during the course of the proceedings in the hearing on the Motion to Suppress such identification and the subsequent trial.

9. That had I been aware of such circumstances, I without question, could and would have demonstrated more suggestion than was demonstrated by me as Mr. Moore's attorney acting without knowledge of what had occurred at such proceedings.

/s/ Frederick F. Cohn
FREDERICK F. COHN

SUBSCRIBED AND SWORN to before me this 7th day of April 1975.

/s/ Deborah Keller
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2222

UNITED STATES OF AMERICA
EX REL JAMES RAYMOND MOORE, PETITIONER

v.

STATE OF ILLINOIS, RESPONDENT

MEMORANDUM OF DECISION AND ORDER

Petitioner previously filed with this Court a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C., Section 2254. This Court originally dismissed the petition on the ground that petitioner had failed to pursue the remedy afforded by the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, Sec. 122-1 *et seq.*

Petitioner appealed the Court's dismissal of his petition to the Circuit Court of Appeals. The Court of Appeals reversed the finding of this Court dismissing the petition. In so finding, the Court of Appeals determined that petitioner's previous presentation to the Supreme Court of Illinois of the issues advanced in his habeas petition satisfied the exhaustion requirement of Section 2254. The Court of Appeals consequently remanded petitioner's case to this Court and indicated that this Court should determine the need for an evidentiary hearing or any other relief warranted by the facts following this Court's review of the entire state record.

Petitioner is represented by counsel following the remandment of his case. Counsel has filed an original memorandum of law and then an amended memorandum of law in support of the constitutional issues raised in petitioner's writ of habeas corpus. The amended memorandum advanced two grounds for release of petitioner due to violations of his constitutional rights: (1) Pe-

titioner was denied Fourteenth Amendment due process and the effective assistance of counsel when he was denied copies of transcripts of pre-trial hearings which contained the identification testimony of the State's sole occurrence witness and; (2) Certain pre-trial identification procedures were highly suggestive and violative of both due process and the Sixth Amendment.

Respondent has filed a motion to dismiss the petition for failure to state a claim upon which relief can be granted and an alternative motion for summary judgment, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

The Court finds that upon a reading of the entire state court record, as well as a review of the various memoranda and affidavits filed by both parties, that there remain no outstanding issues of material fact and, consequently, this case is ripe for treatment through the medium of the motion for summary judgment.

The complaining witness testified at petitioner's trial on charges of rape, deviate sexual assault, burglary, and robbery, that on December 14, 1967, at approximately noon, she was awakened from a nap by a noise in her apartment. As she opened her eyes, she saw a man standing in her room. When the complainant screamed, the man physically assaulted her. She was then forced to perform an act of oral copulation and to submit to sexual intercourse. While leaving the apartment, the assailant took several items of personal property including two musical instruments. The complainant identified petitioner as the man who attacked her.

A jury found petitioner guilty of each of the above charged offenses and he was sentenced to concurrent terms of not less than thirty (30) nor more than fifty (50) years on each of the rape, burglary, and robbery convictions, and not less than five (5) nor more than ten (10) years on the conviction for deviate sexual assault.

Further facts, as they relate to the issues raised in the petition, will be dealt with in the Court's treatment of those issues.

I

Denial of Copies of the Preliminary Hearing Transcripts

In remanding this case to this Court, the Circuit Court of Appeals indicated the necessity of reviewing three preliminary hearing transcripts. This Court, in reviewing the entire state court record and the submissions by both parties has found transcripts of only two pre-trial hearings, other than the hearing on the motion to suppress identification, those hearings held on December 21, 1967, and February 5, 1968. Petitioner's amended memorandum of law does not refer to any other pre-trial hearings. Therefore, this Court deems a review of the two referred to transcripts as sufficient in light of this particular issue.

In petitioner's direct appeal to the Illinois Supreme Court, that Court ruled that petitioner's right to equal protection of the laws was violated by the trial court's failure to grant petitioner a copy of the transcript, citing *Roberts* v. *LaValle*, 389 U.S. 40 (1967). The Illinois Supreme Court, however, went on to rule that the denial of the transcript was harmless beyond a reasonable doubt citing *Chapman* v. *California*, 386 U.S. 18 (1966). This conclusion was reached following a review of the testimony at the trial, the testimony of the preliminary hearing held on February 5, 1968, and at the hearing on the motion to suppress the identification of the petitioner by the complaining witness.

This Court has reviewed the entire state court record including the testimony given at all of the above hearings and the pre-trial hearing held on December 21, 1967. A review of the testimony at each of the above proceedings indicates that the denial of the transcripts of the pre-trial hearings, although amounting to a denial of equal protection of the laws, was harmless beyond a reasonable doubt.

Petitioner's additional assertion that he was denied his Sixth Amendment right to the effective assistance of counsel is based on the premise that his counsel would have been better prepared to cross examine and, pos-

sibly, impeach the complaining witness at trial. However, a review of these pre-trial proceedings does not indicate any inconsistency between the complainant's testimony at those proceedings and her later testimony at trial. Consequently, the position taken by petitioner that he was denied the effective assistance of counsel due to his failure to obtain a copy of the pre-trial proceedings has no solid foundation.

The petitioner alludes to one statement made by the complainant during her testimony at the preliminary hearing on February 5, 1968, which petitioner argues could have opened a possible avenue of impeachment. The statement by the complainant was to the effect that the lighting conditions in her apartment at the time of the incident resembled, ". . . . night, as clear as it could be . . ." A reading of the transcript of the entire hearing, however, indicates that the statement was either a slip of the tongue or a reference to a darkening of her room because the windows were covered. A reading of the transcript of the December 21, 1967, proceeding fails to indicate any discrepancy between her testimony of that day and any testimony she gave at subsequent proceedings.

Petitioner has attached to his reply memorandum an affidavit given by the attorney who represented him at both the pre-trial hearing on the motion to suppress identification and at trial. The affidavit states that if defense counsel had had a copy of the transcript of the hearing of December 21, 1967, he could have employed it at the subsequent motion to suppress identification to further indicate the amount of suggestion and influence present in the complainant's identification of petitioner at the December 21 hearing.

The Court notes at this point that the circumstances surrounding the identification made at the hearing on December 21 were developed substantially at the hearing on the motion to suppress even though defense counsel did not have the benefit of the requested transcript. As to the suggestive nature of certain remarks made by the Assistant Cook County State's Attorney at the hearing on December 21, the Court will more fully treat the

impact of those statements in the second section of this opinion. However, it is this Court's opinion that any constitutional deprivation resulting from the denial of the transcripts of the hearings on December 21, 1967 and February 5, 1968, was harmless beyond a reasonable doubt.

II

The Pre-Trial Identification Procedure

Petitioner asserts in his second major contention that the pre-trial identification procedure was highly suggestive and resulted in violations of his due process and Sixth Amendment rights.

The identification procedure which is said to have been unduly suggestive took place on December 21, 1967; one week after the incident which led to petitioner's prosecution.

On December 21, 1967, the complainant was brought to Court for what was to be a preliminary hearing. A policeman had told the complainant that there was a suspect and that she should identify him if she could. The complainant was sitting in the courtroom when her name was called. The petitioner's name was called after hers. The complainant approached the bench and the petitioner was brought out into the courtroom. The only other people in the immediate area were the petitioner's wife and two bailiffs. One of the bailiffs was black, as is the petitioner, but was shorter and heavier than petitioner. The following colloquy took place:

> The Clerk: James Raymond Moore.
> The Court: Are you James Raymond Moore?
> Mr. Moore: Yes, sir.
> The Court: You're charged with rape and deviate sexual assault. Are you ready for hearing? Is Marilyn Miller here?
> Miss Miller: (The complainant) Here.
> Mr. Walsh: (Assistant State's Attorney) Judge, we're going to request a continuance, at this time. There's further investigation being conducted for prints being found on the scene. This is an allega-

tion of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. Do you see the man in Court today that committed these acts upon your person?

Miss Miller: Yes.

Mr. Walsh: Will you point to him?

Miss Miller: There. (Indicating)

Mr. Walsh: Indicating the defendant, James Raymond Moore, for the record. We'll request a short continuance, two weeks to prepare our evidence.

No attorney had been appointed for petitioner at the time of the above hearing.

The complainant, Miss Marilyn Miller, had signed a complaint against petitioner prior to the above proceeding. Petitioner argues that the complainant first learned that petitioner was the man she was to identify when she linked the name on the complaint she had previously signed with the name (i.e., petitioner's name) that was called in the courtroom. The transcript of proceedings is less than clear as to what effect the calling of petitioner's name in the courtroom had on the complainant's identification of petitioner. The confusion may have arisen from the fact that the complainant had never known the name of the man who had raped her. Nonetheless, Miss Miller asserted in a very positive manner, regardless of the possible suggestive influence in the way she first linked petitioner's name to his person, that she did know that the person who was brought out into the courtroom was the man who had raped her.

Several elements surrounding the identification procedure used at the hearing on December 21, indicate that the procedure was suggestive. The record indicates

that petitioner was viewed by the complainant in what was essentially a single-man show up. The only other men present at the time of the identification were two bailiffs. One of the bailiffs was a black man but he was shorter and heavier than the petitioner. Furthermore, the Assistant State's Attorney made several remarks in the presence of the complainant which could easily have been construed by the complainant as strong indications that significant incriminating evidence had been seized from the petitioner's apartment. All this had come prior to the time complainant had an opportunity to indicate her belief that petitioner was the man who had raped her. The above elements indicate that the procedure employed was suggestive and is not approved by this Court.

The Supreme Court established the rule in *Stovall* v. *Denno*, 388 U.S. 293 (1972), that whether a confrontation conducted in a particular case is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [a defendant] was denied due process of law . . . depends on the totality of the circumstances surrounding it." 388 U.S. at 302.

In the case of *Neil* v. *Biggers*, 409 U.S. 188 (1972) the Supreme Court held that the central question concerning the identification procedure employed is whether under the "totality of circumstances" test the identification was reliable even though the confrontation procedure was suggestive. The Court held that the significant factors to be considered in deciding the reliability issue were: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. See *United States ex rel Kirby* v. *Sturges*, 510 F. 2d 397 (7th Cir. 1975).

A consideration of the above factors in the instant case indicate to this Court that the complainant's identification of petitioner was sufficiently reliable to blunt the due process argument of petitioner.

Contrary to the argument of the petitioner, a reading of the transcript of the testimony given by the complainant at trial indicates that she had a good opportunity to observe the perpetrator of the crimes at the time of the incident.

Although the complainant had been asleep in the bedroom of her apartment, she was awakened by a noise. She then had an opportunity to observe the intruder at close range for ten or fifteen seconds. The time of the incident was approximately noon and, although there were coverings over the two windows in her room, a significant amount of sunlight filtered into the room from both windows and from the open doorways to adjoining rooms. The complainant indicated that she was very alert at the time. Complainant's positive identification of the petitioner as the intruder was bolstered by the fact that a man she identified as the petitioner had approached her in a bar the night before the incident and had spoken with her at close range for several minutes after approaching her.

The complainant had given a description of her attacker prior to the suggestive confrontation which described the man as six feet to six feet-two inches, over 200 pounds, dark-complected, and having facial hair around his lips and chin. The petitioner's description in the record was six feet-two inches, 240 pounds, and having a beard.

The complainant exhibited a high level of certainty during every corporeal identification of defendant. The only time she hesitated was during a photographic lineup when she picked out two or three photos out of approximately 200 photos shown to her but even then she did pick out petitioner's photo.

Seven days passed between the date of the crime and the date of the suggestive confrontation, but this was not an unduly long delay considering the circumstances surrounding her observations on the day of the crime. The above facts indicate that the complainant's identification of petitioner at his trial was quite reliable.

Petitioner asserts that this Court should apply to his case the exclusionary rule promulgated by the Supreme Court in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) that identification testimony should be excluded at trial if a post-arrest identification proceeding takes place in the absence of counsel. Petitioner argues that the exclusionary rule is applicable even though the identification procedure in question took place prior to petitioner's indictment (see *Kirby* v. *Illinois*, 406 U.S. 682 [1972]) but after a complaint had been signed against him. The Court finds it unnecessary to decide this question.

The exclusionary rule of *Wade-Gilbert* is not a *per se* rule. The admissibility of the identification testimony depends upon whether the witness' identification of the petitioner is based on a source independent of the witness' observation of him at the identification procedure. *United States* v. *Pigg*, 471 F. 2d 843 (7th Cir. 1973).

According to the above observations, it is clear that the complaining witness' identification of petitioner at trial had an origin independent of the suggestive proceeding on December 21. Therefore, whether the *Wade-Gilbert* principle is applicable or not would have no impact upon this Court's ruling.

The Court would note that this finding of a strong independent origin for the complainant's identification of petitioner contributes strongly to the finding of harmless error reached in the first section of this opinion.

Finally, the Court notes that petitioner has asserted that the statements made by the Assistant State's Attorney at the proceeding on December 21, 1967, which were quoted above, relating to certain evidence seized in petitioner's apartment were untrue and were known to be untrue by the prosecutor at the time he made them. This assertion appears to be a bare allegation without any support or elaboration in the memoranda or exhibits submitted to this Court. The affidavits which were submitted by petitioner's counsel do not, contrary to counsel's contention; establish the truth of this assertion. Furthermore, this observation is made only within the overall context of the major argument relating to the

suggestive nature of the pretrial identification. Because of the Court's findings relating to the reliability of the complainant's identification testimony at trial, notwithstanding the suggestive nature of the pre-trial identification, the Court feels that the question of the verity of the statements made by the prosecutor is not so crucial as to alter the Court's finding.

Accordingly, in light of the above observations, the respondent's motion for summary judgment is granted.

/s/ William J. Lynch
Judge
United States District Court

Dated: June 3, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable WILLIAM J. LYNCH

Cause No. 73 C 2222 Date July 3, 1975

Title of Cause

UNITED STATES EX REL JAMES RAYMOND MOORE *v.* PEOPLE OF THE STATE OF ILLINOIS

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

The petitioner's motions for leave to appeal *in forma pauperis*, pursuant to Rule 24 of the Federal Rules of Appellate Procedure, and for the issuance of a certificate of probable cause, pursuant to 18 U.S.C., Section 2253, are hereby granted.

Having reviewed the petitioner's motions, attached affidavits, and the respondent's submission in opposition to the issuance of a certificate of probable cause, the Court finds that defendant is without sufficient funds to prosecute the appeal in this cause, that the appeal is not frivolous, and that the issues presented by said appeal represent cognizable claims for relief under 28 U.S.C., Section 2254.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 27, 19—

(Argued January 20, 1976)

Before HON. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

No. 75-1697

UNITED STATES OF AMERICA, EX REL.
JAMES RAYMOND MOORE, PETITIONER-APPELLANT,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 73 C 2222
WILLIAM J. LYNCH, Judge

ORDER

Petitioner was indicted and convicted on charges of burglary, deviate sexual assault, rape and armed robbery in 1968. He brought this petition for a writ of habeas corpus on due process and equal protection grounds alleging that his conviction was based upon an impermissibly suggestive identification; that he was denied effective assistance of counsel; that he was entitled to a pre-trial hearing transcript; that the government withheld evidence favorable to the defense; and, that the prosecutor knowingly made false statements in court. The district court, in an extensive and thorough opinion, dismissed the habeas corpus petition. We affirm.

The facts in the case show that Marilyn Miller was raped in the bedroom of her apartment around 12:00 noon on December 14, 1967. She had entered her bedroom for a nap at 11:15 or 11:30 a.m. and was asleep when she was suddenly awakened by a noise. Upon looking across the room to the bedroom doorway she observed a man armed with a knife-like object. She later described him as over six feet tall, very powerful, dark complected, young Negro male, over 200 pounds in weight. As she tried to get out of bed, her feet got tangled in a quilt. The man then threw himself on the bed on top her and twisted her body so that her face was forced into the pillow and she was lying on her stomach. About 10-15 seconds elapsed between the time she first saw the man in the doorway until her face was pushed into the pillow. While she was face down, the man removed parts of her clothing, turned her over and placed a quilt over her face. As she turned over, she observed his face was now covered with a bandana below the eyes. He then forced her to perform a deviate sexual act and raped her. The man next left the bedroom, went into an adjoining room out of her view for a short time and left the apartment. Miller called the police and then noticed that her guitar and flute were missing. Left behind was a plastic folder resembling a checkbook or an address book which allegedly belonged to the defendant's former girlfriend.

On the evening preceding the rape, Miller had been accosted by the man who raped her in a nearby restaurant. He took her by the hand and, on the pretense of reading her palm, made suggestive remarks about a supposed lack in her love life and his ability in that regard.

Two days after the rape the police showed her several hundred photographs from which she selected two or three pictures. One was a photograph of petitioner James Raymond Moore.

Moore was arrested on December 20, 1967 and brought to court on the next day for a preliminary hearing. At the hearing Miller positively identified Moore as the man who had raped her. Following a probable cause hearing, indictment and trial, Moore was convicted and

sentenced to serve 30 to 50 years. Moore's conviction was affirmed by the Illinois Supreme Court, *State of Illinois* v. *Moore*, 51 Ill.2d 79 (1972) and he subsequently filed this petition for habeas corpus relief.

I. DEFENDANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS WHEN IDENTIFIED.

The Supreme Court has recognized that flagrantly suggestive pretrial identification procedures may result in a denial of a defendant's right to due process of law. *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 968 (1968); *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967 (1968); *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972). In *Stovall* v. *Denno* the Court stated the test for a violation of a defendant's due process right; i.e., whether the identification of a particular defendant is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied a due process of law . . . depends on the totality of the circumstances surrounding it . . ." 388 U.S. 302. In applying this test the Court further instructed in *Neil* v. *Biggers* that the trial judge must decide "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."

The trial judge, in the instant case, filed an extensive and well written opinion outlining the facts surrounding the identification and applying the factors annunciated in *Neil* v. *Biggers* to determine whether the identification was reliable. He concluded that, although the confrontation procedures used to obtain petitioner's identification were suggestive, the identification was quite reliable and indeed was based upon an independent origin; i.e., on a source [the photo spread] other than the physical confrontation. We have carefully reviewed the facts and are in agreement with the trial court's conclusion.

After the defendant was arrested the victim, Miller, was requested to attend the first preliminary hearing.

She had already selected the defendant's photograph from the police files. She was sitting in the courtroom when the defendant's case was called. She recognized the name of the case because she had previously signed a complaint against Moore. As Moore was brought into the courtroom Miller was motioned up to the bench by the Assistant State's Attorney. The judge asked Miller if she recognized petitioner Moore and she nodded affirmatively. At the time of the physical confrontation Moore was the only defendant present. Admittedly this was not a valid line-up but rather a suggestive one-on-one show-up. Yet, Miller had previously selected Moore's picture from a spread of over 200 photos. This situation parallels a previous decision of this Court in *United States* v. *Pigg*, 471 F.2d 843 (7th Cir. 1973) wherein an identification was also made in a suggestive setting at a pretrial hearing. The Court approved of the identication despite its suggestiveness because the witness had previously identified the defendant's photograph. The Court concluded:

> "Therefore, there is sufficient evidence that her identification of Pigg came from a source independent of the arguably suggestive observation of the defendant at the Dayton, Ohio hearing", 471 F.2d at 848.

Similarly, in this case Miller had made an independent identification of Moore before the identification in court. But even overlooking this independent identification there is substantial other evidence that the identification was reliable. Miller clearly saw the defendant the night before the crime when he made suggestive remarks to her in a restaurant. When he entered the apartment she was able to observe him for 10 or 15 seconds in daylight before he overcame her. She never took her eyes off him during this time. During the actual rape his features were only partially hidden by a bandana. Her testimony at trial was quite forthright:

Q. "When you saw James Moore come out of that side door in Judge Ryan's . . . [courtroom] did you recognize him at that time?"
A. "Yes."
Q. "Did you recognize him at that time as the man who raped you on the 14th of December, 1967?"
A. "Yes. I'd never forget his face."
Q. "Are you sure that's the man?"
A. "I'm positive."

Miller persisted in her identification despite pleas by the petitioner's wife that she might have picked the wrong man. Although Miller did not have a long time to view the petitioner it is highly unlikely that she would be mistaken. Considering that the nature of the crime involved a personally humiliating, terrifying and painful occurrence, it is reasonable to assume she could remember what her assailant looked like.

Recently in *Israel* v. *Odom*, 521 F.2d 1370 (7th Cir.) this Court was presented with another rape case wherein the witness identification was also made in a highly suggestive situation. The Court reviewed the facts of the rape strikingly similar to the instant case, and concluded that the identification was reliable. Chief Judge Fairchild concluded for the Court:

> "The identification procedures employed in this case were suggestive in varying degrees, and unnecessarily so. They are not condoned. The constitutional consideration here. however, is not police behavior but rather reliability of identification. While this case is close, we have carefully studied the testimony and concluded that there was no deprivation of due process", 521 F.2d at 1376.

We believe that we are in the same position as the Court in *Israel* v. *Odom, supra.* In light of the reliable testimony of the victim there was no danger of "irreparable misidentification". Thus we do not think the defendant's due process rights were violated.

II. PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS DENIED A COPY OF THE PRETRIAL TRANSCRIPTS.

The trial court concurred with the Illinois Supreme Court and properly held that the trial judge's denial of appointed counsel's request for a transcript of the pretrial hearing amounted to a denial of equal protection. However, the trial judge added that the denial was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824 (1966).

On appeal petitioner states that since counsel was not appointed until after the pretrial hearing he had no knowledge of the initial proceedings. He argues further that if defense counsel had a transcript he would have been alerted to the serious problem of the suggestive identification at the hearing, he could have more effectively cross-examined Miller who made the identification, he could have moved for a new trial on the basis that the government withheld evidence, or he could have obtained a mistrial because the government made false statements to the court.

A transcript from the pretrial hearing shows that the following colloquy occurred:

> THE CLERK: "James Raymond Moore."
> THE COURT: "Are you James Raymond Moore?"
> MR. MOORE: "Yes, sir."
> THE COURT: "You're charged with rape and deviate sexual assault. Are you ready for the hearing? Is Marilyn Miller here?"
> MISS MILLER: "Here."
> MR. WALSH: "Judge, we're going to request a continuance, at this time. There's further investigation being conducted of prints being found on the scene.
> This is an allegation of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to

commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar, and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. Do you see the man in Court today that committed these acts upon your person"?

MISS MILLER: "Yes."

MR. WALSH: "Will you point to him?"

MISS MILLER: "There (Indicating)."

MR. WALSH: "Indicating the defendant, James Raymond Moore, for the record. We'll request a short continuance for two weeks to prepare our evidence."

THE COURT: "January 19th."

In fact some of the assistant state's attorney's comments were in error. None of the articles recovered in the defendant's home actually were the articles taken from the Miller apartment after the rape. However, there is no evidence in the record that the prosecutor knowingly made false statements or that evidence favorable to the defense was withheld in violation of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). When the prosecutor made his remarks he was simply relying on the best information available to him at that time, which later turned out to be incorrect. Certainly the court did not rely on those statements in scheduling the next court date and setting bond. The transcript does not really contain exculpatory material. Under *Brady* the nondisclosure of evidence violates due process only when it is "material either to guilt or punishment." We do not believe that there was anything material in the transcript denial which related to petitioner's ultimate guilt or punishment.

Petitioner's other allegations arising out of the denial of the transcript also do not rise to a constitutional dimension which would require reversal. Petitioner says his counsel was denied the right to effectively cross-examine the victim because he did not have the tran-

script which showed the suggestive nature of the identification. Yet a reading of the record indicates that petitioner's able trial counsel extensively cross-examined Miller on her identification as well as the facts of the crime. It is difficult to see how the pretrial transcript really could have aided him in cross-examination.

III. PETITIONER'S RIGHT TO COUNSEL WAS NOT VIOLATED AT THE INITIAL PRETRIAL IDENTIFICATION.

Petitioner contends that this Court should follow the exclusionary rule outlined by the Supreme Court in *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) and *Gilbert* v. *California*, 388 U.S. 263, 87 S. Ct. 1951 (1967); that identification testimony should be excluded at trial if a post-arrest identification proceeding takes place in the absence of defense counsel. However, since the petitioner's identification at the pretrial hearing, the Supreme Court has adopted *Kirby* v. *Illinois*, 406 U.S. 682, 92 S.Ct. 1877 (1972) which narrowly limits the per se exclusionary rule to line-ups "after the initiation of adversary judicial criminal proceedings —whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Although the petitioner's identification occurred prior to the *Kirby* decision we think it is applicable since it was an attempt by the Court to explain and perhaps narrow the *Wade-Gilbert* decisions.

Under the facts of this case we do not think there is any Supreme Court authority which requires reversal. First of all, the *Wade-Gilbert* principle is inapplicable because prior to the in-court identification, Miller had identified the defendant as her assailant from police picture files. Her in-court identification was of an independent origin. Second, the in-court identification could hardly be considered a line-up.

Third, assuming that *Wade-Gilbert* applied, *Kirby* states that the per se exclusionary rule will only be used in post-indictment situations. This was the petitioner's first appearance in court and there is no doubt that it

was prior to his indictment. Even if counsel had been present at the initial court hearing it is difficult to imagine what he could have done to protect petitioner's interest. The court hearing was scheduled, the complaining witness had already selected the defendant, and at some point in the prosecution a confrontation would occur. However, we do not condone this practice by the prosecution and only suggest that a formal line-up before or immediately after arrest would have been the better practice to follow. Since the district court was correct in finding an independent origin for the identification it was also correct in refusing to apply a *Wade-Gilbert* exclusionary rule.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 75-1697

June 10, 1976

Before

Hon. JOHN S. HASTINGS, Sr. Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

UNITED STATES EX REL. JAMES RAYMOND MOORE,
PETITIONER-APPELLANT

vs.

PEOPLE OF THE STATE OF ILLINOIS,
RESPONDENT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn.

(73 C 2222)

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

THE MUNICIPAL COURT OF CHICAGO
First Municipal District of
THE CIRCUIT COURT, COOK COUNTY, ILLINOIS

No. 76 MC CC

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs*—

JAMES RAYMOND MOORE, DEFENDANT

[1] REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable DANIEL J. RYAN, Judge of said Court, this 21st day of December, A.D., 1967.

APPEARANCES:

HON. JOHN J. STAMOS,
State's Attorney, by
MR. MATTHEW WALSH,
Assistant State's Attorney,
appeared for the Plaintiff,
MR. JAMES RAYMOND MOORE,
appeared pro se.

[2] THE CLERK: James Raymond Moore.
THE COURT: Are you James Raymond Moore?
MR. MOORE: Yes, sir.
THE COURT: You're charged with rape and deviate sexual assault. Are you ready for hearing? Is Marilyn Miller here?
MISS MILLER: Here.
MR. WALSH: Judge, we're going to request a continuance, at this time. There's further investigation being conducted of prints being found on the scene. This is an allegation of rape and deviate sexual assault. It's

a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. Do you see the man in Court today that committed these acts upon your person?
MISS MILLER: Yes.
MR. WALSH: Will you point to him?
MISS MILLER: There. (Indicating)
[3] MR. WALSH: Indicating the defendant, James Raymond Moore, for the record. We'll request a short continuance, two weeks to prepare our evidence.
THE COURT: January 19th.
MR. WALSH: The State will ask for a $5,000 bond.
THE COURT: I'll make it $10,000 all together.
MR. WALSH: All right, Judge, thank you very much.

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
FIRST DISTRICT—MUNICIPAL DIVISION

No. 68 549

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs*—

JAMES R. MOORE, DEFENDANT

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—

FEBRUARY 5, 1968

* * * *

[2] MARILYN MILLER,

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. NEVILLE:

Q State your name, please.
A Marilyn Miller.
Q And you reside at 1512 East 53rd Street in the City of Chicago, is that correct?
A Yes, sir.
[3] Q On December 14, 1967, at about 12:15 P.M., what, if anything, occurred at your apartment?
A The defendant entered the apartment and approached me. I was sleeping on the bed. I must have awakened when I heard the door open.
Q How was entry to your apartment gained?
A The door was not locked. It was closed but not locked.

Q Do you see the man in court who came into your apartment?
A Yes.
Q Point him out, please.
A (Indicating).
Q Indicating for the record, the defendant, James Moore.

* * * *

[6] Q Had you ever seen the defendant prior to the time he entered your apartment?
A Yes, the night before.
Q Where had you seen him the night before?
A In Smedley's Bar and Grill, in the same block where I live.
Q Had there been any conversation between you and the defendant at that time?
[7] A Yes.

* * * *

CROSS EXAMINATION BY MR. HOUSE:

Q What is your occupation?
A Research specialist.
Q Where?
[8] A Encyclopedia Brittanica.
Q What was the lighting conditions in your apartment at the time this took place?
You say you were home in bed?
A Right.
Q What were the lighting conditions?
A It was night, as clear as it could be, but—
Q The shades and blinds were drawn?
A There is a blanket over the window. There are no curtains.
Q So there was hardly any light?
A There are no doors between the living room and the bedroom.
There are open spaces, so there was light coming in.

* * * *

[10] EXAMINATION BY THE COURT:

Q Did he take anything when he left the apartment?
A Yes.
Q What did he take?
A A Bundy flute and a Martin guitar.
Q Was there a medical? Did you go to the hospital after that?
A Yes.
THE COURT: Was the medical positive?
THE POLICE OFFICER: It was positive.
MR. HOUSE: I believe the flute and guitar was never recovered.
Is that right?
THE POLICE OFFICER: No.
THE COURT: But it was taken.
What is the corroboration?
MR. NEVILLE: There was a letter found.
THE COURT: What is the letter—
MR. NEVILLE: A letter was written by another witness who we have in court today.

* * * *

[11] THE COURT: Did you see his record?
MR. HOUSE: I saw all of that.
THE COURT: Here is five years, eight years in '55, two to ten in 1960.
This will be held to the grand jury on all three.
The bond is $10,000.00 on each one.
MR. HOUSE: I would still like to ask some questions of the complaining witness and the other witnesses that the State has, if it please Your Honor.
THE COURT: What good will it do?
I am gong to hold it over anyway.

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
April 5, 1968

* * * *

(The following colloquy occurred outside the presence of the Defendant and prior to selection of the Jury)

* * * *

[9] THE COURT: * * * We'll ask that the Grand Jury minutes be preserved, we'll ask the preliminary hearing statements be preesrved, any police reports that might be made relating to this case may be preserved and made available at the time of trial.
MR. COHN: Is it my understanding that you deny my request to have supplied to me prior to trial a copy of the preliminary hearing?
[10] THE COURT: You are not entitled to it. I'll have it made available for you and for your use at the time of trial.
MR. COHN: May I argue that motion, your Honor?
THE COURT: What is the basis that you have?
MR. COHN: Well, there is a case out of the United States Supreme Court, the citation I do not have—
THE COURT: Don't get Federal discovery rules versus the discovery rules of the State of Illinois.
MR. COHN: No. It is LaValley v. Roberts, I do not have the citation, it is a case arising out of the State of New York, and the Supreme Court said an indigent de-

fendant has a right to receive a transcript of a preliminary hearing. Since a nonindigent defendant can purchase this, any road block put before an indigent, like my client, which caused him to have less rights than a person with money, was a violation of the constitutional rights of equal protection.

Now, if my client had funds I could go to the court reporter and order a transcript written or a certain date and I could get it. I can do that before trial. It is not like the Grand Jury and police reports, I can get that before trial, hence, [11] if I can do it for a client that can afford it I have a right to it for an indigent defendant prior to trial, as per Griffin, and I would like that document written up.

MR. WALSH: People v. Gibbons, 228 NE 2nd, the Court says the defendant is not entitled to a free transcript of the preliminary hearing.

THE COURT: That is the rule that has been followed by our Appellate Court and I'm going to follow it, I see no reason to change it, that has been the established custom here and I know in Griffin and other decisions the defendant is entitled to certain transcripts and they are supposed to be available for him at the time of trial, and it has been the custom of this Court to allow counsel to view these transcripts prior to the placing of the respective witness on the stand in an effort to familiarize the defendant with the previous testimony, and any and all reports, but I see no reason why we should deviate and grant this defendant any other additional pretrial discovery that we don't afford any other defendant.

* * * *

[12] MR. COHN: The next point, your Honor, is a point your Honor has not ruled on, a motion I made with regards to the identification procedure conducted after this defendant was arrested and indicted on one of these charges which occurred in Judge Holzer's courtroom. I believe I have a right to a list of witnesses who were present during that procedure.

THE COURT: I would presume and I would rule on your motion once a motion has been filed wherein which

the identity is to be contested, and in the event you are endeavoring to contest the identification of this witness and move to suppress the identification of this witness then at that time I think it would be appropriate for you to move for the production of those witnesses and we will issue the necessary subpoenas.

MR. COHN: Your Honor, but my point is, prior to moving to suppress those witnesses I have a right, in order to prepare for my motion to suppress, I have a right to go out and talk to those witnesses, the witnesses who were the people in the lineup. * * *

* * * *

[13] * * * I think the pretrial discovery rules in this court do not permit us to insist that the State furnish you with those witnesses. If, however, there is a failure to cooperate and if there is evidence and if there are witnesses that are being in any manner secluded this Court will issue the necessary subpoenas.

* * * *

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
June 24, 1968

* * * *

The Witness, FLORENCE SUZANNE MOORE, having been duly sworn, was examined and testified as follows:

[80] DIRECT EXAMINATION BY MR. COHN:

* * * *

Q Were you present when your husband was arrested?
A Yes.
Q On what day was he arrested?
A December 20th.
Q Where was he arrested?
A At home.
Q Were you in court the next day?
A Yes.
Q In which court were you?
A I beg your pardon?
Q Where in court? What courtroom?
A Judge Ryan's courtroom, I believe.
Q Did you see the complaining witness there?
A Yes.
Q Would you please describe what occurred in Judge Ryan's courtroom on that date relative to your husband's case.

A Well, the case was called, James Moore, and we walked up to the bench.
Q Excuse me. Where did he come from?
A Oh, from the back. He was in custody.
Q Who else walked up to the bench?
A A girl.
Q Was that the complainant?
A Yes.
[81] Q Who else was standing at the bench besides the complainant and your husband?
A Well, there were two people from the State, the bailiffs, me—
Q Where was your husband standing?
A In the same place you are standing.
Q Where I am standing now?
A Yes.
Q Where was the complaining witness standing?
A Over on the—
Q You can look until I am, you know, to where she was.
A At the end of the table, facing this way.
Q Would you state that your husband and the complaining witness were approximately three or four—
A The length of the table.
Q The length of the table, which would be approximately seven feet.
MR. TULLY: Seven, eight feet.
MR. COHN: Q Was she asked any questions?
THE WITNESS: A The judge addressed her. I can't remember the statement verbatim, but it was something to the effect of did she recognize—
Q And what did she do?
[82] A She looked at my husband and nodded yes.
Q Were there any other people standing before the bar of the same height as your husband?
A No.
Q Was anyone else standing before the bar who was Negro?
A Bailiff.

Q Bailiff. How old was the bailiff?
A Oh, late thirties, early forties, I don't know. He was shorter and heavier.

* * * *

The witness, MARILYN MILLER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. COHN:

* * * *

[94] MR. COHN: Q Did you identify my client as the [95] person who was in your apartment?
THE WITNESS: A Yes.
Q Where?
A In front of Judge Ryan's court.
Q Did you see him at a prior—at a prior time in a line-up?
A No.
Q Who brought you to court on the day in question?
A Officer Buehler.
Q Did you have conversations with Officer Buehler?
A We talked, I'm sure. Not about the trial. Not about the case.
MR. COHN: I didn't—will you—Mr. Court Reporter, do you wish to read that back.

(The last answer was read by the reporter.)

MR. COHN: Q Did he tell you the purpose or the reason you were going to be in court?
THE WITNESS: A Yes.
Q What did he tell you?
A He told me that there was a suspect, and if I could identify him, I should.
Q Did he tell you under what conditions you would see the suspect?
A I don't remember.

* * * *

[96] A I was sitting in the courtroom, and Mr. Moore's name was called and I was called, and I looked at him and I told the judge that this was the man.

Q Now, you were sitting there in the courtroom when his case was called.
A Yes.

* * * *

[97] THE WITNESS: A No, I came up and faced him.
Q How did you know to come up to the bar?
A My name was called.
Q Your name was called. Who called your name?
A I don't remember.
Q So it's when you came up and your name was called—at the time your name was called, did you realize that the person James Moore being brought out was the suspect you were supposed to identify?
A I knew it was the man. I recognized him.
MR. COHN: Your Honor, that's not responsive to my question. My question is: Did you know that the person being brought out when your name was called was the person you were to view and identify? Yes or no?

* * * *

[98] Q Did you know that when your name was called, the suspect you were to view was to be brought out?
THE WITNESS: A Yes.
Q So when Mr. Moore approached the bench, did you know that he was the suspect you were to view?
A No. Not until his name was given.
Q And once his name was given, did you know that was the suspect you were to view?
A Yes.

* * * *

[99] MR. COHN: Q Did you know or did you believe that the person James Moore, who was brought out, was the person you were to view?

* * * *

[100] MR. COHN: Q Your name was called, is that correct?
THE WITNESS: A Yes.
Q And Mr. Moore's name was called, is that correct?
A Yes.

Q And when his name was called, he was standing at the right hand corner of the table here, is that correct?
A Yes.
Q And you were standing at the left hand corner.
A Yes.
Q At that instant, did you believe that the person standing at the right hand corner was the person you were supposed to view?
A Yes.

* * * *

[101] MR. COHN: Q At the time Mr. Moore was standing here, was there any person standing to the left or the right of Mr. Moore who was as tall as Mr. Moore, the same color as Mr. Moore, the same—
THE WITNESS: A I don't remember.
Q You don't—
A His wife was there, but I don't remember anyone else.
Q Now, when this rape occurred, had you been asleep?
A Yes.
Q And something woke you?
A Yes.
Q Was there a light on in your room?
A No.
Q Are you presently wearing glasses?
[102] A Yes.
Q Were you wearing glasses on that occasion?
A No.

* * * *

[102] Q What does that window look out on?
A It looks out on Harper Court at a shop there. I think it's a yarn shop. And a porch.
Q Was there anything covering the window?
A Yes.
Q What was the covering?
A There's a torn, yellow quilt.
Q By quilt, do you mean what is commonly known as a blanket which is quilted?
[103] A Yes.
Q And this covered the entire window?
A Yes.

Q Now, was the assailant masked?
A Not when he entered.
Q So when you first saw him when you were waking up, he was not masked.
A Right.
Q And then he covered his face with something?
A Later.
Q What did he cover his face with?
A A red and white bandana.
Q How much of his face did this cover?
A It covered—it left the eyes and the top of the head.
Q Just the eyes and the top of the head showed?

* * * *

[104] Q So then how long from the moment you first saw him until the time you were lying on your stomach with your face down, how long was that?
A Ten to fifteen seconds.
Q And after that ten or fifteen second period, the only time you saw him again was with a bandana on his face.
A That's right.
Q And that fifteen or ten seconds was immediately after you had just woken up from a sleep, is that correct?
A Yes.

* * * *

[105] Q Did you talk with Officer Pace?
A Yes.
Q Did you describe your assailant?
A I don't remember.
Q Did you talk to any other officers?
A The detectives arrived shortly after.
Q What were the names of the detectives?
A Detective Pachol and Wasilewski.
Q Did you talk to them?
A Yes, I did.
Q Did you describe your assailant to them?
A Yes, I remember that.
Q Do you remember the description you gave?
A Yes.
Q Will you please relate the description you gave.

A He was over six feet, he was heavy set, very solid. He had some hair on his face. I told what he was wearing, physical description, that's it.

Q What else did you tell the officers about the assailant?

* * * *

[106] Do you recall whether he asked you your name?

A I think he did.

Q Now, were any items taken?

A Yes.

Q What was taken?

A A Martin guitar with one string missing, broken, and a Bundy flute in a black case.

Q Was any money taken?

* * * *

[107] MR. COHN: Q Did you ever tell any of the officers that you had seen the assailant at some prior time?

THE WITNESS: A Yes.

Q Who did you say that to?

A To the detectives.

Q To which detective?

A To both of them.

Q To both detectives. Where did you tell these detectives that you had seen the assailant?

A I had seen him in Smedleys Bar and Grill the night before.

Q Now, when you talked to these detectives, were they writing anything down?

A Yes.

Q Have you testified at the Grand Jury?

A Yes.

* * * *

[108] MR. COHN: Your Honor, I believe that I have a right to—she has now said certain things. I have a right to see her reports. I believe there may be certain inconsistencies in those reports.

MR. TULLY: If he wants to use them for impeachment, he may do that during the course of the trial.

MR. COHN: I have a right to impeach her at this hearing.

MR. WALSH: She is counsel's witness. There is no showing of hostility. As a matter of fact, she has done everything to cooperate.

THE COURT: Overruled.

* * * *

[109] MR. COHN: Q Now, prior to seeing my client, Mr. Moore, in Judge Ryan's court, did you view any photographs?

THE WITNESS: A Yes, I did.

Q And from these photographs, did you select any photographs that resembled the assailant?

[110] A Yes.

MR. COHN: Your Honor, at this time I request the State to produce all photographs which this person had viewed. I filed a subpoena on the State for this.

THE COURT: Do you have them?

MR. WALSH: Judge, I would indicate for the record that we have some photographs. Now, whether or not these are in fact the exact ones, I am not in a position to say. The detective who showed her would possibly be more apt to be able to give you an exact answer. I don't know whether Miss Miller would recognize all these particular photos or not. I have some photos, and for what they are worth, they are available for examination by the Court or counsel.

MR. COHN: Well, your Honor, then at this point I am requesting that the witness be—

THE COURT: Why don't you ask her how many she viewed.

MR. COHN: Q How many pictures did you view?

THE WITNESS: A I had two viewings. On the Saturday after the crime I viewed several hundred. And they were—they went back ten, twenty years, even. And I picked out the persons that fitted the physical, the height and weight.

And then on Monday or Tuesday there was a [111] newer batch of twelve or so, and I did the same. I picked out a couple that had the same build.

Q Well, after you had picked out five or six in one group and three or four from another group, did you finally pick out one photograph?

A No, I refused to.

Q You refused to?

A Yes.

MR. COHN: May I now see all the photographs which she did pick out.

MR. WALSH: Judge, again, I would—

THE COURT: Whatever photographs the State's Attorney has—

MR. WALSH: I have some photographs that were brought down by one of the detectives, and he says he thinks these are some of the photographs. He said they didn't make any notations on the back.

* * * *

[112] MR. COHN: No, your Honor, I think the appropriate procedure, your Honor, at this point, would be to possibly have the witness removed from the stand to be able to put the officer on who brought the photographs down, call him relative to that and find out, you know, where he got these photographs from, because he was subpoenaed, and then he can explain whether these are or are not, then use these photographs for questioning this witness.

THE COURT: I would suggest that you look at the photographs that the State has in its possession and inquire and interrogate as to these photographs. And then as to how they arrived at these photographs, that may be determined by the officer who brought them down.

* * * *

[114] MR. COHN: Well, your Honor, at this point, we only have two exhibits which she thinks she picked out.

THE WITNESS: I saw hundreds of photographs.

MR. COHN: Q You finally did pick out five or six photographs in toto?

THE WITNESS: A I think around thirty in one group, and a couple out of the twelve. I don't remember

how many. They all had the same height, sort of, and build.

MR. COHN: Your Honor, I believe unless the State can bring in a witness to explain why these are not here—I have a right to the pictures that this [115] lady picked out.

THE COURT: If they have them.

MR. COHN: If they do not have them, I believe I have a right for an explanation as to why they do not have them.

THE COURT: Proceed with your interrogation of this witness. We will meet that proposition when we come to it. And I will permit you to put this witness back on the stand, if need be, in order to clarify the point.

MR. COHN: Q Now, you state that you had seen the assailant at a prior time at Smedleys Restaurant, is that correct?

THE WITNESS: A That's true.

Q Would you tell me what day that was.

A December 13.

Q Would that be the day immediately prior to this incident?

A The evening before.

Q The evening before. At what time?

A 10:00 o'clock.

* * * *

[116] Q Were you upstairs or downstairs?

A I went through the whole place. They have a back room there, too, I think.

MR. TULLY: Judge, I am going to object. He is attempting to suppress an identification. Now, surely any incident that occurred prior to the time of the identification itself is a question for the jury or the trier of facts to determine the credibility of a witness testifying. Surely it cannot be brought out at this time, Judge.

THE COURT: Well, I think that in the event that it is shown that this witness had an opportunity prior to the time in question, namely the court date, to have viewed this witness, then it would have a tendency

to show that the in court identification was not restricted and confined to such an extent at that time as to have any element of suggestibility. Therefore, if it is shown that this witness has had [117] an opportunity to see the defendant in the restaurant, it would be a—

MR. COHN: Your Honor, I admit this is evidence which is essentially beneficial to the State's position, and I felt since I have called the witness, I feel it is my duty to bring out all the evidence relative to the point.

THE COURT: Very well. Proceed.

MR. COHN: Q I believe your last statement was that you went through the entire restaurant, is that correct?

THE WITNESS: A That's true.

Q And did you end up sitting down any place?

A Yes.

Q And where did you sit down?

A On a wall seat or bench, it is. It would be facing, on the second floor there, on the—on this wall facing south. And there's a table there, and it's sort of—I remember a cash register being beneath it, so it's directly above where the cash register is below.

Q Now, did you have anything to drink that evening?

A Someone poured me a glass of beer, and I probably tasted it. I don't—I wasn't staying there. I was waiting for two people.

[118] Q Now, do you know who poured you a glass of beer?

A He said his name was Charles.

Q Did you have anything else to drink?

A In there?

Q In there.

A No.

Q Did you have anything else to drink prior that evening?

A I had a beer, maybe, or two.

Q Where did you have that beer?

A In the apartment above mine.

Q How long were you in Smedleys?

A Ten or fifteen minutes.

Q Did you have a conversation with the defendant?

A I did.

Q For how long did you converse?

A Two, three minutes.

Q Did you tell him your name?

A I don't think I did, no.

Q Did you tell anyone your name that evening?

MR. WALSH: Objection.

THE COURT: She may answer.

THE WITNESS: A I don't think I did. I wouldn't.

MR. COHN: Q Did you tell anyone where you lived?

A No.

[119] Q Now, what did you say to Mr. Moore or what did he say to you? What was the conversation about?

A Someone there was talking about palmistry, reading the lines of the hand. And he looked at my hand. I think right before then I was asked if I was doing anything that night or where I was going, if I could stay there.

Q Did Mr. Moore ask you whether you could stay there?

A No, someone else in his group. And I did have plans for that night and I didn't want anyone else to know. I mean I don't like people to come up to my party.

Q You were having a party at your house?

A I had four friends over.

And someone asked if I would—you know, if I could stay there, and I said no, that I was going somewhere and my boy friend was waiting for me.

And then Mr. Moore looked at my hand, grabbed my hand and said something about my heart line; that I needed some loving or something. And I don't remember how he said it, but he sort of offended me.

* * * *

The witness, Detective JOSEPH WASILEWSKI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. COHN

* * * *

[155] MR. COHN: Q Officer, do you know for sure whether the three exhibits you picked out were pictures picked out by the complainant?

THE WITNESS: A No, sir, she didn't pick them out.

Q She did not pick them out?

A She picked one of those, sir.

Q She picked one of those out?

A That's correct.

Q And which one did she pick out?

A The photograph of the defendant.

[156] Q And what did she say about the photograph of the defendant?

A She stated that it looked like the man. She would like to see him in person.

Q And that is the photograph she picked out, is that correct?

A That's correct, sir.

* * * *

[156] Q So those are the—those are three pictures you were sure she viewed, is that correct?

A Yes, sir.

[157] Q And out of those three pictures, only one of them possessed a beard, is that correct?

A That's correct, sir.

Q And did she describe her assailant as having a beard?

A Yes. She said he had hair around his mouth and chin.

* * * *

[160] Q Did you put in your police report that Marilyn Miller said she had seen the assailant on the prior night?

A I don't recall.

* * * *

[162] THE COURT: All right. Don't read that. It's not necessary to read that. The question was is there anything in your report that would indicate that the victim in this case stated that she saw the defendant at Smedley's the night before.

THE WITNESS: No, sir.

* * * *

IN THE CIRCUIT OF COOK COUNTY,
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
June 26, 1968

* * * *

The Witness, MARILYN MILLER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * * *

[211] A Some noise woke me.

Q And were you in the bed at this time?

A Yes.

Q And then what if anything happened after you awoke?

A I looked up. I was still lying on the bed, and across the room in the doorway to the bedroom I saw a man standing there with a knife in his hand.

Q Would you demonstrate to the ladies and gentlemen of the jury at this time exactly how the individual was standing holding the knife in his hand.

A He was standing with the knife in his left hand (indicating), and he had something in his right that he was fumbling with. And I didn't—I am not able to identify what that was.

* * * *

[212] Were you able to tell that the object in his left hand was in fact a knife?

A No, I think it was an awl or an ice pick. A long pointed thing, not a blade, but something you punch with.

* * * *

A I started to move to get out of the bed. I [213] lifted myself up and I started to scream.

Q Now, can you describe the individual that you saw standing in your doorway on that particular day, Miss Miller?

A Yes.

Q Would you do that, please, for the ladies and gentlemen.

A He had on a yellow sweater and dark pants, and he was heavy built. Standing in the doorway, he just filled it up. He was over six feet tall.

Q Did you notice if the gentleman—Was it a man or a woman that was standing in the door?

A It was a man.

Q Did you notice if the individual was Negro or Caucasian?

A He was Negro.

Q Do you see that gentleman in the courtroom today, Miss Miller?

A Yes.

Q Would you step down from the witness stand and indicate by touching the man on the shoulder that you saw in your room on that day.

A He didn't have glasses on then.

MR. WALSH: Indicating, for the record, the defen- [214] dant before this Court, James Moore. Thank you.

* * * *

Q Now, at the time you first saw him, what if anything did you do?

A I screamed.

Q And then what happened after that, if anything?

A My feet got tangled in my quilt, and so I couldn't get out of bed as quickly, and he was coming towards me and telling me not to scream, don't scream and don't

move, or something. And I was frozen, sort of staring at him and the knife in his hand.

* * * *

Q Miss Miller, how long a period of time elapsed [215] from the time you first saw the defendant, James Moore, in the doorway until the time your face was pushed into the pillow?

A Ten to fifteen seconds. It seemed a lot longer, but—

Q All right. At the time—

MR. COHN: I object to "it seemed a lot longer."

THE COURT: Sustained.

MR. COHN: She said ten or fifteen seconds.

THE COURT: The latter portion may be stricken.

* * * *

[216] A He was on top of me, so I couldn't see him, and he let go of my neck, and I knew he still had the knife or awl. And I don't know what he was doing, but I thought he was going to stab me, so I started screaming again.

* * * *

Q Did he make any statement to you at that time?

A Yes. This was a much longer time. He was choking me, and I felt myself blacking out. And he said, "Don't scream. I'm not going to let go of your throat until you say you won't scream any more."

And I tried to tell him I wouldn't, and I couldn't say anything.

* * * *

[217] I asked him if he was going to kill me, and he said he didn't want to have to.

And then he put his hands under me, I'm still lying on my stomach, and tried to undo the belt. And so I asked him if that was all he wanted, if he wanted to make love, or was he going to kill me. And he said—I don't remember what he said. He made some sort of noise or something.

* * * *

[218] Q At the time your pants, your jeans and underpants, were removed, were you still face down on the bed?

A Yes, I was.

Q What if anything happened after that, after part of your clothing was removed?

A I was turned over and a quilt was put over my face.

* * * *

[220] Q Well, at that time, Marilyn, what if anything did he do as he pulled himself up on your chest?

A He exposed himself, and then he arranged the quilt so that it was at the top of my head and my eyes were covered.

Q And then what did he do if anything at that time?

A Then he forced his penis in my mouth.

* * * *

[221] Q And then what if anything occurred after that, Marilyn?

A He stayed there a minute, and then moved down off of my chest and separated my legs and had intercourse.

* * * *

[223] Q What did you do, Marilyn, immediately after he left the apartment?

A I got up and found my pants on my left side of the bed on the floor, and I put them on.

* * * *

[223] Q Did you notice anything else unusual when you bent over to pick up you pants?

A I saw what I thought was my checkbook on the floor, which I kept my money in.

Q Will you describe that article that you thought was your checkbook to the ladies and gentlemen.

A A long, narrow, sort of black plastic covered book.

* * * *

[224] Q Did you have an occasion, Marilyn, to observe that any articles of personal property were missing from your apartment?

A Yes. Right before I called the police I saw that my flute and guitar had been stolen. And so I called the police then.

Q Prior to the time any police officers arrived, did you have an occasion to go back in and examine the bedroom at any time?

A Yes.

Q Did you have an occasion to see that blue book?

A I picked it up. And I had about $60.00 in my checkbook, and I wondered if he had taken it. And then I realized that my checkbook was somewhere else and that this was a stranger's.

• • • •

[225] Q Did you have an occasion, Marilyn, on that day, to see a member of the Chicago Police Department?

[226] A Yes.

Q Do you recall what the first officer's name was that you saw?

A Officer Pace.

Q Were you still in the apartment when you saw Officer Pace?

A Yes.

Q And what if anything did you do or say immediately upon Officer Pace coming to your apartment?

A I gave him that book and told him where I had found it.

Q Did you tell the officer what had happened to you?

A Yes.

Q Did you have a conversation with Officer Pace at that time?

A He asked me questions, and I don't remember much of what he asked or what I told him.

Q Did you have an occasion, Marilyn, later on that same day, to go to a hospital in the City of Chicago?

A Yes.

Q Do you recall the name of that hospital?

A Billings Hospital.

• • • •

[232] Q And did you recognize any of the individuals in those photographs?

A I picked one out.

Q Was that a photograph of the defendant, James Moore?

A I think it was, yes.

• • • •

[234] Q Did you know at the time, Marilyn, that he stepped out of that door, that he was James Moore?

A I knew he was the man who raped me.

Q Did you know he was—Did you know his name was James Moore at that time?

A I don't remember if they called it before he came out or after.

Q And did you subsequently approach the Judge's bench?

A Yes.

Q Did you have an occasion to see the defendant, James Moore, after you approached the Judge's bench?

A Yes.

Q Did you have an occasion to look at him at that time?

A I did.

Q Was he looking at you at that time?

A Yes.

Q Did you identify him as the same man who came into your apartment on the 14th of December and raped you?

A Yes.

• • • •

During the CROSS-EXAMINATION of the Witness, MARILYN MILLER, the following colloquy took place:

* * * *

[254] But at this stage, I think the defendant should be entitled to review a copy of the police report.

MR. COHN: Thank you, Your Honor.

Your Honor, I have also requested that I be given the preliminary hearing testimony.

THE COURT: They gave you the Grand Jury hearing?

MR. COHN: Right. In fact, when I made—

THE COURT: You have that, have you not?

MR. COHN: The preliminary hearing, Your Honor. In fact, I had made a motion prior to trial—

THE COURT: You are not entitled to the reports of the preliminary hearing.

MR. COHN: I had made a motion prior to trial.

* * * *

[255] At that point the State said I had no right to it before trial but I had a right to it at trial for the purpose of impeaching.

THE COURT: You mean this witness? I think you are entitled to it.

MR. TULLY: We don't have it.

MR. WALSH: It wasn't ever written up or never ordered by the Court to be written up.

MR. COHN: Your Honor, I would state on this record that the State's Attorney in open Court stated they would have it available and ready for trial after the witness had testified.

MR. WALSH: We indicated, Judge, the Grand Jury minutes would be preserved for trial, the police reports would be preserved for trial, which they are. There was never any request or demand made upon the State to produce a preliminary hearing transcript. I don't even know if this witness testified at the preliminary hearing.

* * * *

[256] THE COURT: Did she testify at a preliminary hearing?

MR. WALSH: Not to the best of my knowledge.

THE COURT: The only preliminary hearing was before Judge Ryan, is that correct?

MR. WALSH: That's correct, Judge.

THE COURT: Well, why don't we ask her whether or not she testified.

MR. COHN: She just said she—

THE COURT: She said she was present.

MR. COHN: Well, we know she identified him in Court once and some questions were asked on one date.

THE COURT: Why don't we ask her and find out.

* * * *

[257] THE COURT: When you went before Judge Ryan you remember appearing before Judge Ryan?

THE WITNESS: Yes.

THE COURT: Did you offer any testimony down. Were any questions asked of you?

THE WITNESS: Yes.

* * * *

[258] MR. WALSH: I know of no Statutory provision or case law that permits the defendant at this time, or at any time, to have a copy of a preliminary hearing transcript.

THE COURT: It is true that he is not entitled to it on pre-trial discovery. He is not entitled to it prior to the time of trial.

But I am in wonderment as to whether or not at this stage of the trial, if a statement was made in a preliminary hearing, whether or not he would be entitled to it. He is certainly not entitled to it on pre-trial discovery.

MR. WALSH: Judge, I don't think we are bound to supply this.

* * * *

[259] THE COURT: All right. We will proceed.

MR. COHN: Is Your Honor denying my motion?

THE COURT: I am not denying your motion. I say [260] that the transcript of the preliminary hearing is not here. The State does not have a copy of the preliminary hearing report in its file. The proceedings in the preliminary hearing have not, to the best of my knowl-

edge, or to the best of the knowledge of the State, been written up, nor is it available at the time of trial here. The Court, therefore, feels that we can't give the defendant what is not available.

You have the testimony of this witness before the Grand Jury. I am ordering that you be permitted to have the Grand Jury testimony. And I am also ordering that any statement made by this witness to a police officer should also be afforded to you at this time so that you may proceed to cross examine and impeach the witness in any manner you can.

MR. COHN: May I have the police report? I still have not received the same, Your Honor.

Your Honor, then, therefore, at least is denying my motion, because my understanding—

THE COURT: I am not denying your motion. The transcript is not here. The transcript is not available. If it isn't available, I can't deny your motion to the right to it.

• • • •

CONTINUATION OF CROSS EXAMINATION
BY MR. COHN:

• • • •

[263] MR. COHN: Q Now, Miss Miller, at the time you saw your assailant in the room at approximately 12:00—It was approximately 12:00 o'clock, is that correct?

THE WITNESS: A To 12:15, yes.

Q 12:00 to 12:15. And you had been sleeping for approximately a half hour, is that correct?

A Yes.

Q And you are presently wearing glasses, is that correct?

A Yes.

Q Were you wearing glasses then?

A No.

Q Was there a light on in the room?

A No.

Q Is there a window in the room?

A Yes.

Q Was anything covering the window?

A Yes.

Q What was covering the window?

[264] A A quilt and a bedspread.

Q And that covered the entire window?

A Yes.

Q Prior to the assailant getting on top of you, you saw him for about ten to fifteen seconds?

A Yes.

Q And after that time, your face was down in a pillow, is that correct?

A Yes.

Q And during the time your face was down in the pillow, on occasion you became dizzy, is that correct?

A Yes.

Q And then while you were dizzy you occasionally caught a glimpse of the assailant masked with a bandana, is that correct?

A No.

Q Was he wearing a bandana the next time you saw him?
A Yes.
Q Was he wearing a bandana after that at all times?
A Yes.

• • • •

[265] Q So you saw the assailant for a total of ten to fifteen seconds having just woken up, and then on five second intervals when he was masked, is that correct?
A That's true.
Q Now, the first officer you spoke to, was that Officer Pace?
A Yes, it was.
Q Did you tell Officer Pace that the assailant was a male Negro, twenty to twenty-five, 185 pounds, six feet, dark complexion, wearing a yellow sweater?
A I don't think I would have said 185 pounds.

• • • •

[266] Q Did you tell Officer Pace that you had seen the assailant at some prior time?
THE WITNESS: A Not at that point, no.
Q When was the first time you told Officer Pace that you had seen the assailant at some prior time?
A I told the detectives when we got back from the hospital.
Q I see. So you never told Officer Pace that?
A I don't think I did.
Q How long was it from the time the police arrived until the time you got back from the hospital?
A I don't know.

• • • •

[279] Q Now, on a later occasion, the 21st, you were in Judge Ryan's Court, is that correct?
A I think it was the 20th.
Q The 20th or the 21st.
A Yes.
Q Who brought you down to Court?
A Detective Buehler.
Q Did he tell you, or did you know you were there to view a person?
A Yes.

Q Was a name called?
A Yes.
Q Was your name called immediately after that name [280] was called?
A I don't really remember if my name was called or if I was motioned to come up.

• • • •

Q And you were called, is that correct?
A Called or motioned to come up.
Q Who called and motioned you to come up?
A I think it was Mr. Neville.
Q Who is Mr. Neville?
A He works here. I don't know who he is.
Q Is he a State's Attorney?
A I think so, yes.
Q And you came up, is that correct, to the bench?
A Yes.

• • • •

[281] Q And where was Mr. Moore standing?
THE WITNESS: A He was almost right next to me.
Q Almost right next to you. Was there any other Negroes standing at the bar, the bench of the bar?
A Yes, there was.
Q Would you please describe them for me.
A It was a woman.
Q Any other Negro men standing there?
A I don't remember if there was or not.
Q At that time, did you realize that Mr. Moore had been arrested and charged as being the assailant in the incident which occurred in your apartment?
A No.
Q You did not realize that?
[282] A No.
MR. WALSH: Objection. She answered the question.
MR. COHN: Q Did you think he was just a stranger?
THE WITNESS: A I knew I was supposed to look at this man and tell them if he was the one or not.
Q Right. And was he brought out from the back?
A Yes, he was.

Q Was he handcuffed?
A I don't remember.
Q Did he come out by himself or did he come out with a Court official next to him?
A With a Court official.
Q How long had you sat in the courtroom before Mr. Moore had come out?
A Quite awhile.
Q Had you seen other cases called?
A Yes.

* * * *

[283] Q Were people's names called?
A Yes.
Q And normally a person came out of the back room and stood here where Mr. Moore had been standing, is that correct?
A Yes.

* * * *

[285] MR. COHN: Q Yes or no. Did you believe he was a stranger to the proceedings? Yes or no.
THE WITNESS: A No.
Q Did you believe he was involved with that proceeding where they called the name of James Moore? Did you believe he was involved? He was a—Strike that. Did you believe he was a police officer?
A No.
Q Did you believe he was a State's Attorney?
A No.
Q Did you believe he was a defendant?
A I knew he was the man who raped me.
Q Answer yes or no.
MR. TULLY: Let the witness answer. I haven't heard that answer.
Mr. Court Reporter, would you read that answer back, please.

* * * *

[287] A I had signed a complaint, so I recognized the name.
Q You had signed a complaint charging who with rape?
A James Moore.

Q This was before you had come into Court and identified him, is that correct?
A Right before.
Q Before you had ever seen him in Court, is that correct?
A Yes, and I said—I questioned that, and I was told it made no difference.
Q Ah! Who told you it made no difference?
A Officer Buehler.
Q Officer Buehler told you it made no difference, you can—
A That I would just come up here, and if it is the man, yes, and if it isn't, no.

* * * *

You had been told to sign a complaint against Mr. James R. Moore, is that correct?
A Yes.
[288] Q Who told you to sign a complaint against James R. Moore?
A Officer Buehler.
Q And Officer Buehler was one of the investigating officers on this case, is that correct?
A He came in later.
Q Yes. And when you came to Court and you were called up to the bench of the bar, James R. Moore's name was called out, is that correct?
A Would you repeat that.
Q James Moore's name was called out, is that correct?
A Yes.

* * * *

[297] MR. COHN: Q Now, to which officer did you state that the assailant was the same man you had seen the prior evening?
MR. WALSH: Objection, Judge. This question has been asked and answered.
THE COURT: She may answer.
THE WITNESS: A Detective Pachol and Wasilewski.

MR. COHN: Q And they were writing things down when you told them, is that correct?
A They stopped writing at that point.

* * * *

REDIRECT EXAMINATION BY MR. WALSH

* * * *

[304] Q Was there any light coming in that window even with the bedspread on it?
A Yes, there's light coming in. And I put a—it was a torn quilt over the top so that no one would be able to look through the thinner material.
Q And you said there is another window in the bedroom also, is that correct?
A Yes.
Q Was there anything covering that window?
A There were—It's a material you can see right through. It's a gauze, a green colored gauze. * * *

* * * *

Q Even with this green gauze material on it, there was still light coming through the window?
A The gauze wouldn't keep any light out.

* * * *

[308] Q When you saw James Moore come out of that side door in Judge Ryan's chambers, did you recognize him at that time?
A Yes.
Q Did you recognize him at that time as the man who raped you on the 14th of December, 1967?
A Yes. I'd never forget his face.
Q Are you sure that's the man?
MR. TULLY: What? I can't hear.
MR. WALSH: I beg your pardon.
Will you read the answer.

(The last answer was read by the reporter.)

MR. WALSH: Q Are you sure that is the man?
THE WITNESS: A I am positive.
MR. WALSH: Thank you. That's all.

RECROSS EXAMINATION BY MR. COHN

Q You are also positive that you never picked out only one photograph, is that correct?
A Yes.

* * * *

The Witness, Officer FLOYD PACE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * * *

[325] Q Did she tell you how much she thought he weighed?
A She had no idea.
Q Did you make an estimate from the description that she gave you as to how much the man weighed?
A From her description, I made it the minimum.
Q And what is the minimum?
A 185.

* * * *

[329] CROSS EXAMINATION BY MR. COHN

Q Officer, you were the first officer on the scene, is that correct?
A Yes.
Q You filled out a report in this case, Officer?
A Correct.

* * * *

[331] Q Did she tell you that she had seen the assailant before on a prior occasion?
A Not to my knowledge, on the initial investigation.
Q And you were with her for how long before the detectives arrived?
A I'd say about eight to ten minutes. Transporting her to the hospital.

* * * *

IN THE CIRCUIT COURT OF COOK COUNTY,
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
JUNE 27, 1968

* * * *

The Witness, DETECTIVE LAWRENCE PACHOL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * * *

[391] Q Under what circumstances did you see Miss Miller the following Saturday?

A We had arranged an apointment with Miss Miller to come in and view photos that we had at the Area.

Q How many photographs were shown at that time?

A I'd say approximately 200.

Q Did she indicate or pick out any of the photographs that were shown to her at that time?

A She put several on the side that matched the physical description of the offender.

Q Subsequent to the 14th of December, 1967, did you have an occasion to inventory the letter that you have identified and the blue wallet?

A Would you repeat that, please.

Q Subsequent to the day of the 14th of December, 1967, did you have an occasion to inventory People's exhibits number 1, the blue wallet, and number 4, the letter?

A Prior to that date?

Q Subsequent. After the 14th.

A Oh, after that date. Yes, sir.

Q And was that inventoried with the Chicago Police Department?

[392] A Yes, sir, they were.

Q Did you have an occasion to make the physical arrest of the defendant, James Moore?

A Yes, sir.

Q On what day was the defendant arrested?

A 20th of December, 1967.

* * * *

CROSS EXAMINATION BY MR. COHN

* * * *

[394] Q Does it state in that report, the only report made, that Marilyn Miller stated to you or to any of your fellow officers, that the assailant had been in Smedley's Restaurant the night before?

A No, sir, it doesn't.

Q Who made that report with you, Officer?

A Detectives Buehler and Wasilewski.

Q And those were the officers who had talked to Marilyn Miller, is that correct?

A Yes, sir.

* * * *

The Witness, DETECTIVE JOSEPH WASILEWSKI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * * *

[421] A It was either Monday or Tuesday, the following Monday or Tuesday.

Q And where was it that you saw her at that time?

A That was at the Harper Library on the campus of the University of Chicago.

Q And did you have certain photographs with you at that time?

A Yes, sir, I did.

Q Approximately how many in number did you have?

A Nine.

Q And were these photographs shown to Marilyn Miller on that day?

A Yes, sir, they were.

Q Did she indicate or pick out any of the particular photographs that you showed to her?

A She selected the photograph of the defendant as being the man who had attacked her. She also selected one more with the same physical characteristics of the man.

• • • •

IN THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

June 28, 1968

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

INSTRUCTIONS SUBMITTED BY STATE AND DEFENSE RE:

IDENTIFICATION

[625] (State's Instruction No. 4 Given.)

The court instructs the jury that in determining whether or not the defendant has been identified as the person who committed the offense charged in the indictment, if any such offense was committed, you must consider all the testimony in the case, both that for the prosecution and that for the defendant; considering the means of identification; the circumstances under which he was identified; the opportunity for identifying the said defendant; the description of his apparel as stated by the witnesses; and the probabilities or improbabilities that it was the defendant—and, if after so judging and weighing the testimony, you are satisfied beyond all reasonable doubt that the defendant has been correctly identified as the person who committed the offense as charged in the indictment, it is your duty to find the defendant guilty.

[639] (Defense Instruction No. 13 Refused.)

The court instructs the jury that in determining whether or not the defendant has been identified as the person who committed the offense charged against him, you must consider all the testimony in the case, both that for the prosecution and that for the defendant, consider-

ing the means of identification; the circumstances under which he was identified; the opportunity for identifying the said defendant; the influence brought to bear on persons claiming to identify defendant, if any such influence existed; the description of the assailant as stated by the witnesses, if any such was stated; if after so judging and weighing the tetimony you are not satisfied beyond all reasonable doubt that the defendant has been correctly identified as the person who committed the offense as charged in this indictment, if any was committed, it will be your duty to find the defendant not guilty.

SUPREME COURT OF THE UNITED STATES

No. 76-5344

JAMES RAYMOND MOORE, PETITIONER

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 17, 1977

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NO. 76-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES ex rel.
JAMES R. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

OPPOSITION TO PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO. 76-5344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES ex rel.
JAMES R. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

OPPOSITION TO
PETITION FOR ISSUANCE OF
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATEMENT OF FACTS

Petitioner's statement of fact contains so many inaccuracies and omits so many pertinent facts that respondent is forced to submit the following more accurate and complete statement of facts.

On December 14, 1967, around 12:00 noon, Marilyn Miller was raped in her Hyde Park apartment. The day was sunny and bright (Tr. 209-210, 305). She lay down for a nap at 11:15 or 11:30 and was asleep on her bed fully clothed when she was rudely awakened by the presence of an intruder in her home (Tr. 210-211). She looked up and saw a large man whom she later described as an over 6 feet tall, very powerful, dark complected, young Negro male, over 200 pounds in weight, standing in the doorway of her bedroom (Tr. 228). Contrary to the implication of the petition, the room was illuminated by multiple light sources. Light was coming in through one

window of the bedroom, which was partially covered by a torn quilt or blanket, but not so much as to keep no light from coming in. Light was also coming in through the second bedroom window, which was covered by a translucent gauze which "wouldn't keep out any light" (Tr. 304). Light was coming in through two doorways to the bedroom from the living-dining room of the apartment which was illuminated by bright sunlight (Tr. 304-306).

Marilyn Miller was "extremely alert" (Tr. 311) when she viewed her attacker as he entered the room. She looked directly at him, observing his face and his body, his build and the way he was dressed for 10 to 15 seconds under the lighting conditions just described (Tr. 211-216). Contrary to the implications in the petition, he was not wearing a mask at this time. She never took her eyes off him during this time (Tr. 315).

lie on her stomach and partially undressed her, threatening her with a knife-like sharp object. After turning her over on her back, he forced her to submit to oral copulation and then raped her. Only after he turned her over was he wearing a mask (Tr. 214-223). Before leaving her apartment, he took a flute and a guitar belonging to her.

He left behind a plastic folder resembling a checkbook or an address book which contained a letter belonging to a former girlfriend of his, a person not shown to be in any way connected with the victim (Tr. 223-225).

Marilyn Miller then called the police,who took her to Billings Hospital, where she was examined. A vaginal smear taken at that time and her underpants both carried traces of human spermatozoa (Tr. 224-229, 373, 375).

After her examination at the hospital, on the same day as the rape, she told police that she was accosted in a nearby restaurant by the rapist, whom she later identified as petitioner James Raymond Moore. He took her by the hand and on the pretense of reading her palm, made some suggestive remarks

about a supposed lack in her love life and his ability to supply what she needed (Tr. 235-239). The next day he raped her.

The police showed Marilyn Miller several hundred photographs from which she selected two as possibly depicting her assailant. One was a photograph of petitioner James Raymond Moore (Tr. 230-231). She positively identified James Raymond Moore as her attacker at a preliminary hearing on December 21, 1967 (Tr. 232-235) where a summary of the evidence then in the hands of the police was also presented to the judge in order to aid him in setting bond. The hearing was continued, probable cause was later found, and the case was bound over to the grand jury which indicted Moore for rape, deviate sexual assault, burglary, and robbery.

Moore was convicted of these charges at trial and sentenced to 30 to 50 years. The transcript of his trial is attached to the respondent's motion for summary judgment in the District Court as Exhibit B, and is in the record on appeal before the Court of Appeals. Moore's conviction was affirmed by the Illinois Supreme Court, People v. Moore, 51 Ill. 2d 79 (1972). He then filed the present habeas corpus petition (No. 73 C 2222 in the United States District Court for the Northern District of Illinois) and was eventually denied relief by Judge Lynch in his order of June 5, 1975. The Seventh Circuit Court of Appeals affirmed that decision in an unpublished order attached to the petition.

Petitioner now presents two claims to this court. First, he claims he was subjected to a showup in violation of United States v. Wade, 388 U.S. 218 (1967), and Stovall v. Denno, 388 U.S. 293 (1967), at the preliminary hearing of December 21, 1967. Second, he claims he was denied effective assistance of counsel and hence due process because he was not supplied with a free transcript of that hearing.

ARGUMENT

I

THERE WAS AN ORIGIN FOR MARILYN MILLER'S IN-COURT IDENTIFICATION OF JAMES RAYMOND MOORE, INDEPENDENT OF ANY PRETRIAL IDENTIFICATION WHICH MAY HAVE VIOLATED WADE OR STOVALL.

All of petitioner's arguments stem from one basic allegation: that Marilyn Miller's identification of James Raymond Moore at the December 21, 1967 preliminary hearing was violative of United States v. Wade, 388 U.S. 218 (1967), because counsel was not present, and Stovall v. Denno, 388 U.S. 293 (1967), because it was allegedly suggestive. It is clear that even where a violation of these cases is present, the conviction cannot be reversed if the defendant was identified at trial by the witness in question and that identification was based upon a source independent of the allegedly improper pretrial confrontation. United States v. Wade, supra; Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, supra; Simmons v. United States, 390 U.S. 377 (1967); Coleman v. Alabama, 399 U.S. 1 (1970); Neil v. Biggers, 409 U.S. 188 (1972); United States v. Pigg, 471 F.2d 843 (7th Cir. 1973); United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975); United States ex rel. Pierce v. Cannon, 508 F.2d 197 (7th Cir. 1974), among many others. This is just what happened in the present case as the District Court held at page 14 of its opinion and the Court of Appeals held at page 4 of its opinion. (See Tr. 213-214 for the in-court identification.)

On December 13, 1967, the night before the crime, the victim, Marilyn Miller, was approached in a restaurant near her apartment by James Raymond Moore. Moore had several minutes of conversation with Marilyn Miller, the gist of which was that Miss Miller's love life was lacking and that he could make up for that lack. Miss Miller was offended by this conversation and the person who initiated it, James Raymond Moore.

The next day around noon on a bright sunny day, James Raymond Moore entered Marilyn Miller's apartment and raped her. The room where the attack took place was well lighted. Light streamed in from two doors and two only partially covered windows. Miss Miller got a good look at Moore for 10 to 15 seconds as he stood in the doorway and entered the room. She never took her eyes off him during this time. She was also able to observe all of him but that part of his face between the bridge of his nose and his chin at several other times during the course of the attack.

In contrast, the court's attention is called to Coleman v. Alabama, supra where the witness caught a glimpse in the headlights of a passing car of the face of his assailant as he fled. This was held to be a sufficient independent origin. See United States ex rel. Kirby v. Sturges, supra; United States ex rel. Pierce v. Cannon, supra; United States v. Pigg, supra; United States ex rel. Harris v. Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972); United States v. Ganter, 436 F.2d 364 (7th Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), cert. denied, 369 U.S. 1017; United States v. Cox, 428 F.2d 683 (7th Cir. 1970), cert. denied, 400 U.S. 481; United States ex rel. Frazier v. Henderson, 464 F.2d 260 (2d Cir. 1972); United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970), cert. denied, 400 U.S. 908.

Petitioner emphasizes the question of suggestiveness but fails to deal adequately with the question of independent origin. No matter how suggestive the December 21, 1967, identification procedure may have been, it was still reliable because there was an origin for the identification independent of any suggestiveness in the identification procedure itself. United States v. Wade, supra; Gilbert v. California, supra; Stovall v. Denno, supra.

For instance, if Miss Miller's boyfriend had committed some crime against her and she observed him under circumstances

similar to those under which she observed Moore and subsequently was asked to identify him under the most suggestive conditions conceivable, there could be no question that notwithstanding the suggestiveness of the identification procedure, her identification would be a valid one, perfectly admissible under all the cases previously cited. Why? Because she had his features firmly fixed in her mind before the identification ever took place. Although less obvious, exactly the same thing actually occurred in this case.

Although Miss Miller did not know Moore's name, she knew before he ever entered the courtroom on December 21, 1967, who it was that raped her,and when he appeared she recognized James Raymond Moore as that man. The court is referred to Miss Miller's testimony found in the transcript at pages 92 ff. and 207 ff. The testimony read as a whole makes clear that she was positive of her identification.

In the end, petitioner's authorities about mistaken identification to the contrary notwithstanding, the testimony of the witness him- or herself is the most important factor, particularly under the present circumstances. Miss Miller had no reason to lie and fully realized that the more certain her testimony was, the more certain it would be that James Moore would go to jail for a long time. Moore's wife pleaded with her to be sure that she had the right man (Tr. 85). Furthermore, if counsel's affidavit in the District Court is to be believed, Miss Miller was made fully aware of the fact that the flute and guitar supposedly were not hers. She is supposed to have told Mr. Walsh so after examining them in his office. This itself vitiates the alleged suggestiveness of Walsh's statement on December 21, 1967. Not only that, but in the face of this knowledge, her certainty was not for one moment shaken. On the other hand, Moore had every reason to lie and still does. As the District Court held (Opinion at pages 11-13), all of the indicia of reliability set forth in Biggers and Kirby are present in this case.

On this score, it must also be stated that the fact that Miss Miller did not immediately tell police that her assailant was the man she met in the restaurant the night before is not significant. She was upset as a result of the crime and could not necessarily be expected to make the connection immediately. The fact that it took a short time for her to sort out her thoughts does not cast doubt upon her identification of Moore. She told police about the incident the night before and indicated to them that the man in the restaurant was the rapist on the very day of the rape after she returned home from the hospital (Tr. 307). Furthermore, Moore conceded that he had been in the restaurant that night (Tr. 513-51). When this is added to the fact that Moore left the folder containing a letter belonging to his girlfriend at the scene of the crime, something only he could have left there, Miss Miller's accurate description of him,and her certainty that he was the man, her identification of him cannot be doubted.

It must also be noted that the courts below found independent origin as did the Illinois Supreme Court, People v. Moore, 281 N.E. 2d at 298. Such a finding is presumed correct and cannot be upset by a federal court in a habeas corpus proceeding unless not supported by the evidence, 28 U.S.C. 2254(d); LaVallee v. Delle Rose,410 U.S. 690 (1973); United States ex rel. Harris v. Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972).

Finally, it must be noted that we are not dealing with an impersonal crime such as burglary. We are dealing with rape, the most personally humiliating of all crimes. Not only that, but James Raymond Moore was so bold as to invade his victim's own home. The features of a man who would do such a terrible thing were indelibly etched upon the memory of Marilyn Miller and no suggestiveness of any degree could lead her into making a mistake.

Her testimony is clear. During examination of her by defense counsel at defendant's motion to suppress, the following colloquy about the December 21, 1967, proceeding took place:

> Q. So it's when you came up and your name was called, did you realize that the person James Moore being brought out was the suspect you were supposed to identify?
>
> A. I knew it was the man. I recognized him.

and again on direct examination at trial:

> Q. Did you know at the time, Marilyn, that he stepped out of that door, that he was James Moore?
>
> A. I knew he was the man who raped me. (Tr. 234)

and again on cross-examination at trial:

> Q. So when Mr. Moore was brought out here, you knew he was the man who they wanted you to look at, is that correct?
>
> MR. TULLY: Objection.
>
> THE COURT: Sustained.
>
> MR. COHN: Did you think he was a stranger to the proceedings?

A. I knew who he was.

* * *

Q. Did you believe he was a defendant?

A. I knew he was the man who raped me. (Tr. 284-285)

and again on redirect examination at trial:

Q When you saw James Moore come out of that side door in Judge Ryan's chambers (sic, courtroom), did you recognize him at that time?

A. Yes.

Q. Did you recognize him at that time as the man who raped you on the 14th of December, 1967?

A. Yes. I'd never forget his face.

Q. Are you sure that's the man?

A. I'm positive. (Tr. 308)

Clearly, Marilyn Miller identified Moore as the rapist because she remembered him, not because of any suggestiveness in the identification proceedings.

Petitioner attempts to mislead the court on several points relative to this argument. At page 6 of the petition, petitioner states that the victim testified that when she observed the rapist he was masked. This is false. She clearly testified that he did not put the mask on until after he had attacked her and the 10 to 15 second period of observation occurred before the attack as he stood in the doorway of her bedroom.

On the same page, petitioner falsely states that the victim did not inform police she had seen the rapist before until several days after the rape. The record shows that she informed the police the same day. On page 7, petitioner makes the argument not made in any of the courts below that the victim was not positive of her identification. The most salient feature of the present case and the reason that a jury and three courts have thus far allowed petitioner's conviction to stand is the certainty of Miss Miller's identification of Petitioner Moore. The record discloses this certainty with the utmost clarity, particularly in the testimony cited above. Petitioner tries to extract uncertainty from the record where it simply does not exist.

At page 8 of the petition, petitioner makes the bare allegation that the photographic array from which the victim picked Moore's picture was suggestive. Not one shred of evidence is cited to support this conclusion. The courts below found that the photographic identification was proper and constituted an independent and untainted identification of petitioner.

On page 8 petitioner again repeats the falsehood that the victim saw Moore's masked face for 15 seconds. He also repeatedly asserts the falsehood that Miss Miller was uncertain in her identification of petitioner and adds the words "admittedly" and "undisputed" to these false assertions. It was vigorously argued in both courts below that Miss Miller was certain of her identification and both courts

so found. In light of this fact, the words "admittedly" and "undisputed" are completely inappropriate.

At the bottom of page 8,Miss Miller's testimony is falsely characterized by petitioner. She did not testify that she identified Moore because she heard his name called. On the contrary, she testified that she identified him because she recognized him as the rapist. This is clearly reflected in the record as a whole and the quotations from Miss Miller's testimony cited above.

It is also clear from Kirby v. Illinois, 406 U.S. 682 (1972), as the Court of Appeals implied in its opinion, that since petitioner had not been indicted, the right to counsel under Wade did not extend to the December 21, 1967, procedure.

II

THE FAILURE OF DEFENSE COUNSEL TO RECEIVE A COPY OF THE TRANSCRIPT OF THE DECEMBER 21, 1967 PRELIMINARY HEARING DID NOT AMOUNT TO A DENIAL OF DUE PROCESS.

Petitioner claims at pages 9-11 of the petition that his lawyer could have more effectively cross-examined Marilyn Miller at trial had he had the transcript of the December 21, 1967, Preliminary Hearing (attached to the petition as Appendix B). This claim is effectively refuted by reading the trial transcript. It simply would not have been that useful. As the District Court (Opinion at page 7) and the Court of Appeals (Opinion at pages 6-8) found, the circumstances of this proceeding were adequately developed at the hearing on the motion to suppress before the Cook County Circuit Court (Tr. 79-130) with the possible exception of the remark of the Assistant State's Attorney about the evidence recovered from petitioner's apartment. Petitioner fails to acknowledge these findings or refute them in his argument on this point. There was testimony from Moore's wife and Marilyn Miller which described in detail everything that went on at the December 21, 1967, proceeding. As both courts below also found, the transcript

with or without the remark would have made no difference and if it was error for the state court to deny petitioner the transcript it was harmless beyond a reasonable doubt, Chapman v. California, 368 U.S. 18 (1967); Schneble v. Florida, 405 U.S. 427 (1972). See the opinion of the District Court at page 7 and the opinion of the Court of Appeals at pages 7-8.

It is clear that trial counsel put Miss Miller through the wringer on cross-examination and failed to shake her testimony (Tr. 241-303, 308-312). He had available to him every detail but one of the December 21, 1967, hearing and used them extensively. Only one more small factor, the remark of the Assistant State's Attorney, was missing and this would have made no difference in view of the certainty of her identification, in view of the corroborative evidence, in view of the independent origin of her in-court identification (see Section I of this memorandum) and in view of the fact that the prosecution could have shown that the Assistant State's Attorney's statement was not intentionally false and that it was not made to suggest that Moore was the criminal but merely for bond purposes. See the affidavit of Matthew Walsh in the record on appeal before the Court of Appeals.

Not a single case cited by petitioner holds that denial by the trial court of a free copy of a preliminary hearing transcript violates due process by limiting cross-examination. It is also clear that no significant limitation occurred here since, as shown above, with one small exception, the circumstances of the hearing were well known to counsel and he cross-examined on them extensively. The one additional point was merely cumulative.

III.

CONCLUSION

For these reasons, the rulings of the District Court and the Court of Appeals were correct and the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

Petitioner James R. Moore was denied a writ of Habeas Corpus by the United States District Court for the Northern District of Illinois for failure to exhaust state remedies, in an unpublished Memorandum of Decision, entered on March 20, 1974. The United States Court of Appeals for the Seventh Circuit vacated the order of the District Court and remanded for further proceedings, order entered on August 7, 1974.

On June 5, 1975, the United States District Court for the Northern District of Illinois granted the Respondent's Motion for Summary Judgment, Memorandum and order entered on June 5, 1975. The United States Court of Appeals for the Seventh Circuit affirmed, in an unpublished order entered on April 27, 1976.

The Illinois Supreme Court had affirmed Petitioner's conviction on April 6, 1972, in *People v. Moore*, 51 Ill.2d 79, 281 N.E.2d 294 (1972).

JURISDICTION

The judgment of the Court of Appeals, which affirmed the denial of a writ of Habeas Corpus, was entered on April 27, 1976. (Appendix C of Petition for Certiorari.) On June 10, 1976, the Court of Appeals denied a Petition for Rehearing *en banc*. The Petition for a Writ of Certiorari was filed on September 8, 1976, and granted on January 17, 1977.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. §2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

I. Whether the Petitioner was entitled to have Counsel appointed and present at a pretrial confrontation with the sole eyewitness, which took place after the formal judicial proceedings had begun.

II. Whether the Petitioner was denied due process by the admission at trial of in-court identifications

derived from an unnecessarily and impermissibly suggestive one-on-one confrontation with the sole eyewitness, where there was no adequate independent origin for the identifications.

III. Whether, in a criminal case involving a substantial likelihood of misidentification, it was prejudicial error to deny transcripts of all proceedings wherein the Petitioner, an indigent defendant, was identified by the sole adversarial eyewitness.

STATEMENT

A. Procedural History

After a jury trial, Petitioner James R. Moore was convicted in August, 1968 of rape, robbery, burglary and deviate sexual assault; he was sentenced to three concurrent terms of 30 to 50 years, and one of 5 to 10 years. The Supreme Court of Illinois affirmed the conviction. *People v. Moore*, 51 Ill.2d 79. The Petitioner filed, *pro se*, a petition for writ of habeas corpus in the Northern District of Illinois; his petition was dismissed for failure to exhaust State remedies but was reinstated by the United States Court of Appeals for the Seventh Circuit, on August 7, 1974.

In November of 1974, the Prison Legal Services Project began representation of Petitioner in the District Court, where the Respondent's motion for summary judgment was granted in June, 1975. (Memorandum of Decision) No evidentiary hearing was ordered.

The Seventh Circuit affirmed in an "Unpublished Order," dated April 27, 1976, holding that the District Judge had not erred in refusing to apply the *Wade-Gilbert* exclusionary rule. (Unpublished Order, p. 9)

On September 8, 1976, Petitioner sought this Court's review of the Seventh Circuit's decision, and certiorari was granted on January 17, 1977.

B. Statement of the Facts

The essential facts regarding the identification of Petitioner, James R. Moore, are derived from his State court trial transcript, made a part of the Record before this Court. There was no evidentiary hearing held in the District Court.

At about 12:00 or 12:15 p.m. on December 14, 1967, Marilyn Miller was awakened by some noise in her apartment. (Tr. 211) She had been lying in bed asleep for approximately a half hour (Tr. 263), when she opened her eyes and saw a man with a knife, standing in her bedroom doorway. (Tr. 211)

There was no artificial lighting in the apartment at that time (Tr. 263), and both bedroom windows were covered. (Tr. 264, 304)

In the next 10 or 15 seconds, she screamed and started struggling to get out of bed, but her feet got caught in the bedclothes. (Tr. 212-214) That 10 to 15 second period was her only opportunity to see the intruder's face. (Tr. 215) At all times thereafter, he was wearing a bandana on his face (Tr. 264), and her own eyes were covered. (Tr. 218) Marilyn Miller was sexually assaulted, and the man left without ever removing his mask. (Tr. 220-221, 265)

Marilyn Miller, a white woman, could not remember, either at the Motion to Suppress hearing or at the trial, whether she had described the assailant to the first police officer she saw. (Tr. 105, 226) However, that

police officer testified that she had told him she was attacked by a large Negro man wearing a yellow sweater. (Tr. 324) The Police Officer completed his report with his own estimates of the assailant's height and weight. (Tr. 325)

Later that day, the complainant gave another description to a different police officer, in which she added that the assailant had facial hair. (Tr. 105)

According to her testimony, the third or fourth time Marilyn Miller gave a description, she told two detectives that she believed the assailant was a man she had seen in a bar the night before. (Tr. 107) The official police report prepared by the detectives, however, does not show that Ms. Miller ever made this statement. (Tr. 404)[1]

Two days after the assault, Marilyn Miller was unable to identify the assailant from a photographic display of some two hundred (200) pictures. (Tr. 110) The next week, police arranged a second photograph spread containing seven (7) to 12 pictures. (Tr. 421) The police did not mark any of these pictures; the exact number which Marilyn Miller saw is unknown. (Tr. 42, 111, 145)

By the time of the second photographic viewing, the police had investigated the ownership of a small blue plastic book or folder which Marilyn Miller had given them on December 14, 1967. (Tr. 391) Some time after she was attacked that day, the complainant had picked up what she thought was her black plastic checkbook,

[1] The man she had seen the night before was James R. Moore. (Tr. 115-117) The two had a brief conversation about 10:00 p.m. on December 13, 1967. (Tr. 120) They did not exchange names or addresses. (Tr. 118)

but on looking more closely she realized it did not belong to her. (Tr. 223-224) At that point, she called the police to report the sexual assault, and gave the blue plastic book to the first officer who arrived. (Tr. 226)

Some time between Thursday, December 14, 1967, and the following Monday or Tuesday, the police discovered that the blue plastic book or folder belonged to James R. Moore. (Tr. 391) Testimony from two witnesses at trial related that time on the night of December 13, 1967, Petitioner had been around the bar where Marilyn Miller had seen him, searching for "kind of a book" which he never found that night. (Tr. 505-506)

The police placed Petitioner's picture among the second group of photographs shown to the complainant. (Tr. 421) It was the only picture which showed a black man with a beard. (Tr. 157) Marilyn Miller selected this picture. (Tr. 111, 156) This identification was tentative, according to police; the complainant expressed a wish to see a suspect in person. (Tr. 156)

On December 20, 1967, police arrested James R. Moore at home. (Tr. 80) He remained in custody over night and was taken to court on December 21, 1967, for his first preliminary hearing. (Tr. 80) On the day of the hearing, Marilyn Miller was brought to the courtroom by one of the investigating officers in the case. (Tr. 232) This detective asked her to sign a complaint naming James R. Moore as her assailant. (Tr. 287) When she questioned this procedure, the policeman told her it made no difference. (Tr. 287)

The complaining witness knew that she had been brought to the courtroom in order to identify a

suspect. (Tr. 279) When James Moore's name was called, she recognized the name from the complaint she had been asked to sign. (Tr. 287) Then, Mr. Moore, the defendant in the case, was brought out from custody (Tr. 281-282); he was not represented by counsel. (From transcript of the First preliminary hearing; hereinafter, "Pet. App. B")[2]

At this point, the judge called Marilyn Miller's name (Pet. App. B), and a State's Attorney motioned her up to the bench. (Tr. 280) After the judge had informed Defendant Moore of the charges against him, the prosecutor stated, in the presence of the complainant, that fingerprints had been found at the scene and certain of the complainant's property had been recovered from Petitioner's apartment, along with the clothing worn by the assailant. (Pet. App. B) The prosecutor then asked Marilyn Miller to identify her assailant. (Pet. App. B) She indicated the Defendant, James R. Moore.

At the trial, the State did not introduce the items referred to at the Petitioner's first preliminary hearing. (Transcript) The one fingerprint found at the scene was not James R. Moore's print. (Tr. 356)

On February 5, 1968, Petitioner's second preliminary hearing was held, at which the complainant identified Petitioner. (Transcript of February 5, 1968 hearing, p. 3) The judge found probable cause (Transcript of February 5, 1968, p. 11), and the grand jury indicted Petitioner for rape, robbery, burglary, and deviate sexual assault, on February 14, 1968, Indictment

[2] The Transcript of the first preliminary hearing was attached to the Petition for Certiorari as Appendix B. References to that transcript are made hereinafter as "Pet. App. B."

Number 68-549 (Tr. C-002) On April 5, 1968, the court appointed Frederick Cohn as counsel for Moore, an indigent defendant. (Tr. C-029) Moore's newly-appointed attorney made oral pre-trial motions for discovery and for free transcripts of the preliminary proceedings at which counsel had not been present. (Tr. 1-13) The trial court denied the request for preliminary hearing transcripts, saying that the Defendant was not entitled to them until the trial was in progress. (Tr. 11-13)

A hearing was held on Defendant's pre-trial Motion to Suppress Identification, and the Motion was denied. (Tr. 62-170) At no time during the Suppression hearing or during the trial did the Defendant or his appointed attorney ever see the transcripts of the preliminary proceedings. (Tr. 667-693, Affidavit in D. Ct.) At the trial, the complainant identified Mr. Moore as her assailant. (Tr. 213) The jury was given only one Instruction on eye-witness identification, that submitted by the State (Tr. 625), and Defendant was found guilty on all four counts of the indictment. (Tr. 655-656) He was sentenced to concurrent prison terms of 30-50 years, 30-50 years, 30-50 years, and 5-10 years. (Tr. 712-713)

Mr. Moore's conviction was affirmed by the Illinois Supreme Court which held, *inter alia*, that the denial of the transcripts to defendant, an indigent, violated the Equal Protection Clause but was harmless error, and that there was a basis for the eyewitness identification other than the December 21, 1967 confrontation. (*People v. Moore*, 51 Ill.2d 79, 281 N.E.2d 294 (1972))

Mr. Moore sought federal habeas corpus relief in the Northern District of Illinois, where the State's Motion for Summary Judgment was granted; the district judge

having found that the transcript denial was harmless error and that even though the confrontation procedure may have been suggestive, there was a sufficient independent origin for the identification. In purportedly following this Court's decision of *Neil v. Biggers*, 409 U.S. 188 (1972), the district court found it unnecessary to decide whether *Kirby v. Illinois*, 406 U.S. 682 (1972) would change the result. (Memorandum of Decision, p. 14)

On appeal, the United States Court of Appeals for the Seventh Circuit held that the writ was properly denied on the basis of harmless error, and the ruling in *Neil v. Biggers*, 409 U.S. 188 (1972). In addition, the Seventh Circuit held that *Kirby v. Illinois*, 406 U.S. 682 (1972) precluded the right to counsel at Defendant's admittedly suggestive confrontation proceeding, because such confrontation occurred before Defendant was indicated. (Unpublished Order)

The Court of Appeals further denied Defendant Moore a Rehearing en Banc, June 10, 1976, and this Court granted Petitioner's Writ of Certiorari on January 17, 1977.

SUMMARY OF ARGUMENT

I.

The right of the accused to have counsel present at a pretrial confrontation with an adversarial eyewitness attaches once the formal judicial proceedings have begun. The presence of defense counsel at that critical stage in the prosecution is necessary to protect against the introduction of impermissible suggestion, and to

preserve the accused's right to cross-examination of the eyewitness and to the effective assistance of counsel at trial.

A defendant who has been formally charged but not yet indicted is peculiarly vulnerable to the impermissibly suggestive procedure of presenting a single suspect to an eyewitness by means of a courtroom "showup." The informed presence of counsel is the only safeguard for a defendant who is subjected to such a one-on-one viewing by the adversarial eyewitness.

Because the holding of *Kirby v. Illinois*, 406 U.S. 682 (1972) does not preclude the right to the presence of counsel at an identification procedure which occurs after the prosecution has begun by way of formal charge or preliminary hearing, the Court of Appeals was incorrect in holding that the right to counsel did not attach until after "indictment." The admission at Petitioner's trial of all identification testimony which followed the confrontation, at which Petitioner was unrepresented by counsel was reversible error.

II.

A defendant who is subjected to an unnecessarily and impermissibly suggestive identification procedure which gives rise to a substantial likelihood of misidentification, is thereby deprived of due process, independently of any deprivation of the right to counsel at such a confrontation. The Court of Appeals correctly found that the one-on-one, courtroom presentation of Petitioner to the sole adversarial eyewitness was suggestive, but erroneously applied the "totality of circumstances" test and found the identification which derived from

the "showup" to have been reliable. The Court of Appeals should have applied a strict rule of exclusion to the identification evidence stemming from this unnecessarily and impermissibly suggestive post-*Stovall* confrontation, without regard to the reliability of such evidence, in order to preserve Petitioner's due process right to a fair trial.

Even if a strict exclusionary rule were not mandated in this case, the identification testimony should have been excluded because it was unreliable in the "totality of circumstances." The likelihood of substantial misidentification entered the case at the first, extremely limited opportunity of the witness to view the assailant, under poor lighting conditions. This harm was indicated by the witness' inability to provide more than a vague initial description of the assailant. The sequentially reinforcing elements of suggestivity had begun well before the ultimate courtroom "showup," thus the Court of Appeals erred in holding that there was an adequate independent basis for the witness' identifications.

Since Petitioner's conviction rested in large part on the sole eyewitness' identification testimony, and that testimony was tainted by a suggestive photographic procedure and a suggestive courtroom "showup," both of which created a substantial likelihood of misidentification, the Court of Appeals should have held that admission of that testimony at trial was reversible error.

III.

It is a denial of due process and equal protection not to provide appointed counsel with free transcripts of

the proceeding at which the indigent defendant was initially confronted by the sole adversarial eyewitness, and of the proceeding at which that witness again identified the defendant in court. Inasmuch as the attorney of a paying client could have obtained and utilized such transcripts in preparation for trial, and to perform meaningful cross-examination of the sole eyewitness at trial, Petitioner's appointed attorney should have been able to do likewise.

Since the question of Petitioner's guilt or innocence turned on the issue of identification, and his attorney was denied the use of transcripts containing critical identification testimony and the suggestive remarks made by the prosecutor at the confrontation proceeding, Petitioner was deprived of the effective assistance of counsel. Therefore, the Court of Appeals was incorrect in holding that the transcript denial had been harmless error.

ARGUMENT

I.

PETITIONER WAS ENTITLED TO HAVE AN ATTORNEY APPOINTED AND PRESENT AT HIS PRELIMINARY HEARING, BECAUSE IT WAS A CRITICAL STAGE OF THE PROSECUTION, AT WHICH MOORE WAS CONFRONTED BY THE ONLY ADVERSARIAL EYEWITNESS.

The Sixth Amendment to the United States Constitution guarantees that an accused person "need not stand alone against the State at any stage of the prosecution,

formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" *United States v. Wade*, 388 U.S. 218, 226 (1967). Moreover, this Court has decreed that because pretrial confrontations between an accused and an eyewitness pose a grave potential for prejudice at trial, such a confrontation is a "critical stage," requiring the presence of counsel. *Id.* at 236-237 (1967) For without an attorney present to observe–and possible avert–any impermissible procedures employed by police and prosecutors, the accused has no means of preserving his right "to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 226.

At the other end of the spectrum, this Court has clarified that at stages of mere police investigation, before the prosecution has begun, the right to counsel does not apply to identification confrontations. *Kirby v. Illinois*, 406 U.S. 682 (1972). In *Kirby*, this Court dealt with an identification which occurred in the police station, pursuant to prompt police investigation of a robbery. On the basis of the suspect's having been in possession of the victim's property, police called the robbery victim to the station. On entering the room where Kirby was sitting at a table, the witness immediately and spontaneously identified Kirby and his companion as the robbers. *Id.* at 685. This Court found that Kirby had not been facing the prosecution at that point, and so did not require the presence of defense counsel.

By contrast, the case at bar involved a series of identifications, each of which was tainted by some form of suggestion. The most flagrant of these suggestive confrontations took place at the Petitioner's first

preliminary hearing, where no counsel was appointed for him, although he was indigent and formal judicial proceedings had begun. The absence of counsel at this crucial physical confrontation with the sole eyewitness contaminated all the identifications which followed.

In *Kirby v. Illinois*, 406 U.S. 682 (1972), this Court held that a police station confrontation was premature for the necessity of counsel. But it based this decision on the principle that the Sixth Amendment guarantees counsel for a defendant once the criminal judicial proceedings have begun–"whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Id.* at 689. Thus, the rules enunciated in *United States v. Wade*, 388 U.S. 218 (1967), remain vital in those confrontation proceedings which are inherently adversarial.

The Court of Appeals, however, ruled in this case as though *Kirby v. Illinois*, 406 U.S. 682 (1972), had created a Sixth Amendment hiatus after aggressive prosecution begins but before the technical indictment is entered. A plain reading of *Kirby* demonstrates that this Court did not intend such a gap in the Sixth Amendment's protection.

Petitioner's right to counsel had already attached by the time he was confronted openly by the complaining witness in his first preliminary hearing. Further, the deprivation of that right prejudiced him at subsequent court appearances. Therefore, all the in-court identifications of Petitioner which followed the December 21, 1967 confrontation should have been excluded.

Reserving, for the present, the confrontation's impermissible suggestiveness, it is important to examine the facts surrounding this courtroom "showup." Once it is understood that this identification confrontation was

carried out in court, at a preliminary hearing, after a Complaint, by the same State's Attorney who would prosecute at trial, and before the same judge who would later hold Mr. Moore over to the grand jury, it is evident that defense counsel should have been there, too.

On December 21, 1967, James R. Moore had been in custody overnight because he did not have enough money to make bail. (Tr. C-012) That day, he was brought before a Municipal Court judge in Cook County, for his preliminary hearing. (Pet. App. B) Unknown to Moore, the complainant Marilyn Miller was also in the courtroom with a police detective, waiting to identify him. (Tr. 287)

When Petitioner was led out of custody, he thus walked right into the trap of an uncounseled confrontation with the complainant of a sexual assault. (Tr. 287) He was, perforce, standing alone against the State, the very danger of which this Court warned in *United States v. Wade*, 388 U.S. 218, 226 (1967).

Although the decisions of this Court have not yet focused on a factual situation precisely like that in this case, there are numerous opinions among the Circuits which disapprove the practice of showing an unpresented defendant to an eyewitness. A brief overview of these Courts of Appeals cases reveals the scope of the "courtroom showup" problem.

In *Sanchell v. Parratt*, 530 F.2d 286 (8th Cir. 1976), the Eighth Circuit ordered a new trial, and in the event of no retrial, the complete discharge of a Nebraska prisoner who had been subjected to illegal "showups." The defendant in that rape-robbery case had been arrested on an unrelated charge and was being arraigned on that charge when a police officer ushered in the five

rape-robbery victims, to view Sanchell. Sanchell had not been charged with the rape-robbery, and did not have an attorney at the time of the viewing; he, the only tall heavy black male (the description of the offender) in the room, was seated at counsel table with his back to the witn sses. One of the victims identified him afterward, and police arrested Sanchell for the rape-robbery. 530 F.2d 286, 290.

The next time the five witnesses saw Sanchell was at his preliminary hearing on still another charge. His attorney was unsuccessful in getting the rape-robbery witnesses excluded, thus they heard identification testimony concerning the unrelated charge. At the preliminary hearing on the rape-robbery charge which followed, two witnesses believed Sanchell to be the offender. And at trial, three of the five identified him, the third having made her decision to do this without seeing Sanchell again. 530 F.2d 286, 290-291.

The Eighth Circuit held that only the first witness' testimony should have been admitted at trial, since the other two witnesses' identifications were tainted by impermissibly suggestive procedures, and stated:

> The suggestiveness inherent in any showup was surely aggravated here by choosing a forum that would tell the witnesses that Sanchell had been charged . . . The government had no legitimate interest in displaying the petitioner to the witnesses in so suggestive a manner . . . (citation omitted)

Sanchell v. Parratt, 530 F.2d 286, 290 (8th Cir. 1976).

The Sixth Circuit has held that the conviction of an unrepresented defendant who has been viewed at an impermissible suggestive courtroom "showup" must be reversed. *United States v. Luck*, 447 F.2d 1333 (6th Cir. 1971). In that case, the accused, charged with bank

robbery, was brought to court for arraignment; there he was viewed by eleven witnesses to the robbery. The Sixth Circuit found that the identifications which followed this "showup" should have been suppressed, and that the conviction could not be upheld without them. 447 F.2d 1333, 1337.

In 1969, the Court of Appeals for the District of Columbia expressly held that counsel was required for a defendant who was surreptitiously viewed at his preliminary hearing. *Mason v. United States*, 414 F.2d 1176, 1178 (D.C. Cir. 1969). In finding that the erroneous admission of identification testimony based on that "showup" was prejudicial, therefore reversal was necessary, the Court said:

> Assuming that irreparable prejudice may result from unsupervised preliminary hearing confrontations – an assumption apparently compelled by *Wade* – we can think of no sound reason why counsel should *not* be present at such viewing.
>
> Nor do we think it manifest that counsel is not needed to detect and counteract those suggestive influences which remain. The Government relies on the fact that preliminary hearing viewings are matters of public record, lacking in secrecy and capable of reconstruction at trial by enterprising defense counsel. An absence of secrecy, however, is at best a modest benefit if no one is watching.

Mason v. United States, 414 F.2d 1176, 1179, 1180 (D.C. Cir. 1969)

As in all the cases discussed above, no one was watching at Petitioner's preliminary hearing when the detective handed Marilyn Miller a complaint with Petitioner's name on it, and then asked her to identify that named individual when he was brought into court.

(Tr. 287) No one was able to reconstruct that important scene in the confrontation which took place on December 21, 1967, because Petitioner had no attorney there to see any of it.

This Court had found, in *United States v. Wade*, 388 U.S. 218 (1967) that the secret nature of an uncounseled confrontation is responsible for an increase in the dangers inherent in eye-witness identification. This problem is exacerbated when the witness is the victim, whose "understandable outrage may excite vengeful or spiteful motive". *Id.* at 230. Thus, the need for counsel was urgent in Petitioner's case, where all the hazards were present. Yet, no attorney was appointed to observe his preliminary hearing confrontation.

The Second, Third and Fourth Circuits have decided in accord with the Sixth, Eighth, and District of Columbia Circuits that such counsel-less viewings are critical stages in the criminal proceedings. Hence, even if the defendant has a lawyer, the failure to provide true notice of the "showup" to defense counsel is error.

Addressing the notice problem, the Third Circuit in *United States v. Mitchell*, 540 F.2d 1163 (3rd Cir. 1976), observed that it would be appropriate for the Government to notify defense counsel of the existence of any pretrial identifications, as a matter of discovery. There, the defendant had been viewed by three witnesses at his preliminary hearing, but his attorney did not know this in time to effect a remedy. Consequently, the conviction was affirmed due to this procedural omission. In his concurring opinion, Judge Sterm supplemented the Panel's observations:

> A preliminary hearing is conducted to test the propriety of the detention of an accused person. It is not meant to provide a stage on which the

> Government may parade a defendant for surreptitious viewing by witnesses whose only function at the hearing is to watch.

United States v. Mitchell, 540 F.2d 1163, 1169 (3rd Cir. 1976).

United States v. Roth, 430 F.2d 1137 (2nd Cir. 1970), *cert. den.*, 400 U.S. 1021 (1971), was a federal criminal case in which the eyewitness remained uncertain of his identification even after the State arranged for him to see the accused in a "walk through" the courtroom in which Roth was seated at counsel's table. While the Second Circuit found no prejudicial error in this particular instance, it condemned the practice for its failure to give notice to defense counsel. Because of the informality of such procedures, the possibility for subtle suggestiveness increases, and along with it, the need for counsel's presence and awareness. 430 F.2d 1137, 1141 (1970).

The Fourth Circuit case of *Patler v Slayton*, 503 F.2d 472 (4th Cir. 1974), while holding that there was no need to exclude the testimony of a witness who was clearly not influenced by illegal identification procedures, found that the mere presence of counsel was insufficient, and that real notice is required in all confrontations. There, the police had walked the handcuffed defendant past the witness in the stationhouse, and she still did not identify him positively.

In discusssing the need for counsel at such a suggestive confrontation, the Fourth Circuit carefully analyzed and applied this Court's opinion in *Kirby v. Illinois*, 406 U.S. 682:

> The plurality opinion in *Kirby* does not set forth an "indictment" test but refers only to "the initiation of adversary judicial criminal proceedings . . ." There is no question but that Patler had already been served with a warrant charging him with first-degree murder, that he had been confined several hours and that his attorney was present at the police station . . . As to the show-up viewed by both witnesses we find that "adversary judicial criminal proceedings" had been initiated and that Patler was entitled to the informed presence of counsel under *Wade* and *Gilbert*.

Patler v. Slayton, 503 F.2d 472, 476 (4th Cir. 1974).

The instant case supplies an even clearer illustration of the need for counsel at illegal courtroom confrontations than those discussed above. Here, there is no question but that adversarial proceedings had begun, by way of formal charge and preliminary hearing.[3] There was no doubt that Moore was the person to be viewed by the only eyewitness in the same case in which he

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[3] In Illinois, there are three different ways for the prosecution to begin. The first is by Complaint, the second by Information, and the third, by Indictment. (Ch. 38, Ill. Rev. Stat., §111, Proceedings to Commence Prosecution.) A Complaint may be signed by any citizen, and this is usually done through the police, as in the case at bar. The Information is instituted by the State's Attorney's office alone, usually accompanied by affidavit of one who has knowledge that a crime has been committed.

The Indictment by the grand jury may be waived by the defendant, but otherwise is required in all felony cases. If Indictment is not waived, then there must be a Preliminary Hearing on a Complaint or Information. (Ch. 38, Ill. Rev. Stat., §111-2)

This latter situation existed in Petitioner's case and so, conceivably, the State's Attorney could have proceeded without resort to the grand jury, in which case the December 21, 1967 hearing on the Complaint would have been the most critical stage in the prosecution in and of itself.

had been charged. Finally, Petitioner was indigent and therefore had no attorney of his own. Under *Wade* and *Kirby*, Petitioner was entitled to a court-appointed lawyer at that critical confrontation.

In addition to the six Circuits which have condemned "uncounseled showups" as such, two courts have held that there is a right to counsel at pre-indictment confrontations. In *Blue v. State*, ____ P.2d ____, 20 Cr. L. 2361, the Alaska Supreme announced that its State constitution guaranteed a right to counsel at a pre-indictment lineup, absent any exigent circumstances. The Alaska court's reasoning was that the suspect's right to fair procedures generally outweighs the need for prompt investigation. Hence, the presence of counsel at a lineup fulfills three constitutional rights: the right to counsel, the right to due process during the lineup procedure, and the right to confront the witnesses which ensures effective cross-examination.

In that Alaska case, there had been two lineups, one conducted in a courtroom, several days after the suspect's arrest; and the other, in a poolroom, hours after the crime occurred. The court found that there was a right to counsel in the first lineup, which involved no exigent circumstances; but that the interest of prompt investigation outweighed the desirability of counsel in the second lineup. *Id.* at 2361.

The Tenth Circuit, too, has held that there is a right to counsel at pre-indictment lineups, because the same dangers exist, irrespective of the "indictment." In *Wilson v. Gaffney*, 454 F.2d 142 (10th Cir. 1972), *cert. den.*, 407 U.S. 854 (1972), the court stated:

> But surely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. * * * Every reason set forth by the Supreme Court in *Wade* (Part IV, pp. 228-239) for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere. We hold that petitioner had a right to counsel at the (pre-indictment) lineup here considered.

Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir. 1972).

In the case before this Court, the highly improper "courtroom showup" is accompanied by the denial of counsel to a formally-charged defendant who was not yet indicted. The combined effect of these two violations was to subject Petitioner to a highly suggestive and unfair procedure at a time when he was singularly vulnerable. This Court has left ample provision in *Kirby* to avoid this double-edged problem:

> The initiation of judicial criminal proceedings is . . . the starting point of our whole system of adversary criminal justice. * * * It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the sixth Amendment are applicable.

Kirby v. Illinois, 406 U.S. 682, 689-690 (1972).

Based on this reasoning, the plurality in *Kirby* did not apply the exclusionary rule to suggestive confrontations which occurred prior to the placing of formal charges. The test in that case was not pre- or post-indictment, but rather the initiation of "adversary judicial criminal proceedings – whether by way of *formal charge, preliminary hearing, indictment, information,* or *arraignment.*" 406 U.S. 682, 689 (1972). (emphasis added).

On the same principle, namely that a defendant – once he is formally charged – is enmeshed in the criminal judicial process, this Court should find that the pretrial confrontation in the instant case was a critical stage of the prosecution. This determination would assure defendants like Petitioner of the capacity to meet the opposition in the adversarial setting of the courtroom. Not to provide the defendant with an advocate at this stage would fatally tip the balance of our three-part justice system, where there are two adversaries and a neutral judge. 1971 Approved Draft, American Bar Association Standards, *The Defense Function*, §1.1.

In the decision below, the Court of Appeals failed to grasp the essence of the harms done to Petitioner in the hearing at which Moore was confronted, without counsel. Only part of what happened on December 21, 1967, is reflected in the transcript of it, but even that part had its impact. The State's Attorney in Petitioner's case had the witness identify Petitioner just after he had told the judge, in the witness' presence, that the articles stolen from her apartment had been "found" in Petitioner's apartment. (Pet. App. B) This statement – never supported at any later stage in the case – amounted to the State's presenting its evidence at this preliminary proceeding in a manner that suggested – and thus, tainted – the identification. Moreover, the presiding judge did nothing to help restore the adversary balance which had just been destroyed.

It is therefore unquestionable that this first preliminary hearing, at which Petitioner was viewed and then identified by the State's eyewitness was an adversarial proceeding within the standard set forth in *Kirby v. Illinois*, 406 U.S. 682 (1972). Nevertheless, the Court

of Appeals for the Seventh Circuit found that although the uncounseled identification had taken place at the first preliminary hearing, Petitioner had no right to counsel, solely because the confrontation occurred before his indictment. (Unpublished Order, pp. 8-9) But that holding, while purporting to follow this Court's reasoning in *Kirby v. Illinois*, 406 U.S. 682, misconstrues *Kirby* and defies both logic and fact.

In holding that the suspect in the *Kirby* case was not entitled to have an attorney at the police station immediately after his arrest, this Court was applying the principle that defense counsel is guaranteed after the prosecution begins. *Kirby* did not hold that there is a right to counsel until only after the indictment; it held that there is a right to counsel only after formal criminal proceedings have begun. Those proceedings include *formal charge* and *preliminary hearing*, as well as indictment, information, and arraignment. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

In short, even if the Seventh Circuit was correct in finding that the *Kirby* standard of 1972, narrowed the *Wade* approach of 1967, the Seventh Circuit erred in finding the procedure in this case consistent with *Kirby's* proscription. Moore's first preliminary hearing was clearly an adversarial judicial proceeding within the terms of *Kirby*, and he therefore had a right to counsel. *Kirby* did not hold, nor did it imply, that aggressive prosecutorial activity before the indictment could be directed at a counsel-less defendant.

Thus, the Seventh Circuit should have found that Moore had a right to counsel at his first preliminary hearing; and the denial of that right should have been rectified by the exclusion of all in-court identifications which flowed from the counsel-less confrontation.

II.

PETITIONER WAS DEPRIVED OF DUE PROCESS IN THAT IDENTIFICATION TESTIMONY DERIVED FROM AN UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE CONFRONTATION WAS ADMITTED AT PETITIONER'S PRELIMINARY HEARING AND TRIAL.

In this case, the Court is faced with a pre-trial confrontation which was not only inherently suggestive, but which contained numerous additional elements of actual prejudice. In addition, because the confrontation was staged in the courtroom itself, and counsel was not appointed even then, it constituted a flagrant abuse of the principles enunciated in *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Stovall v. Denno*, 388 U.S. 293 (1967).

A. Petitioner Was Subjected To An Unnecessarily And Impermissibly Suggestive One-On-One Confrontation.

As the Court of Appeals found, the one-on-one presentation of James R. Moore to Marilyn Miller was suggestive. (Unpublished Order, p. 4) The complainant was taken into the courtroom where Moore was to have his first preliminary hearing on December 21, 1967, for the sole purpose of identifying the State's only suspect (against whom she had just been asked to sign a complaint). (Tr. 287) There is no question but that James R. Moore was the defendant in the case being heard in that courtroom at that time; indeed, he was the only black man in the room other than a uniformed

bailiff. (Tr. 80-82) Finally, the witness had been shown the complaint which named James Moore as her assailant. (Tr. 287) After all these patently suggestive elements had been introduced, the witness was finally called before the judge to make an identification in open court. *Before* she was actually asked to make the identification, however, the prosecutor assured the result by incorrectly informing the judge, and the complainant, that property stolen from the complainant had been found in Moore's apartment. (Pet. App. B)

This procedure goes far beyond the highly prejudicial practice, itself widely condemned throughout the Circuits, of having a witness identify a suspect without the suspect's knowledge. *See* discussion, *supra*, pp. 16-23. In that situation, the "showup" is arguably a police mechanism, albeit inappropriately used. But in the Petitioner's case, the prosecution was able, in effect, to get testimony from the witness concurrently with the improper identification procedure and the presentation of very suggestive "evidence." It is this feature of the case which brings into bold relief the true nature of the pre-trial confrontation as a kind of trial in itself:

> * * * The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness – "that's the man."

United States v. Wade, 388 U.S. 218, 235-236 (1967).

Moreover, this is not the type of context, contrary to the Seventh Circuit's indication, where there was nothing a defense attorney could have done to assist his

client. (Unpublished Order, p. 9) In fact, because of the in-court setting, a lawyer would have been ideally suited to grasp the implications of the procedure and to prevent them from developing. In *United States v. Wade*, 388 U.S. at 235-237, this Court enumerated the functions which a defense attorney can perform at a confrontation proceeding. Acknowledging first the accused's helplessness to conduct cross-examination as to the confrontation, the Court said:

> And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context (confrontations), where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.

United States v. Wade, 388 U.S. 218, 235 (1967).

In the case at bar, if defense counsel had been appointed and then notified that the witness was there to make an identification, he could have asked that Mr. Moore not be brought into the witness' presence alone. Or, if it had been too late for that, the attorney could have moved to exclude Marilyn Miller from the preliminary hearing. If neither of these options had been available, counsel could at least have gotten the hearing continued until he/she could have interviewed the witness. And, assuredly, defense counsel would have objected to the prosecutor's improper remarks as to the "stolen" property. In these ways, the prejudicial confrontation could have been prevented. *See Mason v. United States*, 414 F.2d 1176, 1178 (D.C. Cir. 1969).

None of these alternatives existed for James R. Moore, however, because he appeared in court unrepresented, and the judge never asked if he wanted a

lawyer. (Pet. App. B) Indeed, even if there had not been an illegal "showup", Petitioner was entitled to have an attorney appointed for him in that courtroom, simply because he was facing the prosecutor and the judge for the first time.[4] *Coleman v. Alabama*, 399 U.S. 1 (1970), held that there is a right to counsel at the accused's preliminary hearing. In applying the long-standing rule of *Powell v. Alabama*, 287 U.S. 45 (1932), this court said: "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

Furthermore, in *Kirby v Illinois*, 406 U.S. 682 (1972), in the precise context of identification procedures, this Court specifically mentioned the preliminary hearing as one of the stages at which there is a right to counsel, because adversary judicial proceedings have begun by then: The *Powell* case makes clear that the right (to counsel) attaches at the time of arraignment, and the Court has recently held that it exists also at the time of a preliminary hearing. *Kirby v Illinois*, 406 U.S. 682, 689-690 (1972).

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[4] But even if this Court's decisions were not controlling on December 21, 1967 (See *Adams v. Illinois*, 405 U.S. 278 (1972), the judge was bound to follow the prevailing law of his own state. The Illinois statute on procedure for arrested persons provides that "The judge shall * * * advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him . . ." 38 Ill. Rev. Stat., §109(b)(2). Unquestionably, Petitioner should have been so advised at his first court appearance on December 21, 1967; but he was not.

There is nothing in the record to suggest a legitimate reason for the deviation from Constitutionally-mandated procedure in this case. It does not appear, for example, that Mr. Moore had not been formally charged. The record shows the opposite: he had been arrested and processed the night before; his case was set for a hearing in the municipal court; and there was a signed complaint. (Tr. 287) The judge himself confirmed the fact that Mr. Moore had been "charged with rape." (Pet. App. B) And yet no attorney was present to protect the defendant's rights in this patently adversarial setting.

The occurrences at this first preliminary hearing on December 21, 1967 could not help but taint the next hearing which took place over a month later. At that second preliminary hearing, Marilyn Miller again identified Mr. Moore on the record. (Transcript of February 5, 1968 hearing, p. 3) And, finally, of course, by the time of the trial in August, 1968, the complainant would "never forget" Mr. Moore's face. (Tr. 308)

B. There Was No Justification For Staging A One-on-One Confrontation Rather Than A Fairly Constructed Lineup.

The Court of Appeals acknowledged that the procedure described above was impermissibly suggestive, yet it did not find that it deprived Petitioner of due process. In so holding, the Court, did not adequately address the important question of the showup's necessity.

In *Stovall v Denno*, 388 U.S. 293 (1967), this Court set the standard for demonstrating a violation of due

process in identification cases, apart from any violation of the Sixth Amendment right to counsel. *Id.* at 302. The *Stovall* case involved the presentation of a single suspect to hospitalized victim of a recent stabbing. This Court found that the exclusionary rule it had outlined in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), would apply prospectively only, hence the rule did not apply to Stovall.

The test which the Court defined for cases in which there was no violation of the right to counsel is whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). Accordingly, no violations of Stovall's rights were found, given the "totality of the circumstances" surrounding the "showup," namely that one victim was already dead, and the hospitalized victim might not live long enough to identify or exonerate the police suspect. *Id.*

But in the absence of such emergencies, it has long been recognized that one-on-one identifications are to be avoided. *Stovall, supra*, at 302. These "showups" clearly indicate to eye-witnesses that this is indeed the person whom the police believe to be the offender. Wall, *Eyewitness Identification in Criminal Cases* 26-40. Under such intrinsic pressure to identify *the* suspect, a witness is more likely to make a mistaken identification than if allowed to choose from an array of persons generally fitting the witness' description of the offender. As one Court of Appeals has put it:

> These dangers may result from such diverse influences as the witness's desire to cooperate with

> the police, from his knowledge that he is expected to identify *some one* he sees . . . , *from uncertain recollections of a stranger's face* distorted by a mental focus on particular features, from a generalized feeling of anger or vengeance, from suggestions subtly *planted by the conduct of a nearby policeman* or other witness, from a *calling of the defendant's name* or an overheard description of his offense . . .

Mason v. United States, 414 F.2d 1176, 1180 (D.C. Cir. 1969) (emphasis added)

This goes far beyond the police-arranged "showup," since numerous other elements of suggestion were introduced by the prosecution. There was no legitimate reason for either the police or the State's Attorney to extract identifications from Marilyn Miller in the way they did. First, the State's suspect was already in custody. So, there was no police emergency here, as there was in *Stovall, supra.* Secondly, since police had arrested Mr. Moore at his home (nearly a week after the offense took place), haste was not necessary to ensure his being apprehended. Nothing in the Record indicates that Marilyn Miller was at all indisposed, unlike the hospitalized victim in *Stovall*, hence she could have viewed Mr. Moore as part of a police lineup.

Furthermore, in a city of the size and demographic composition of Chicago, there would have been no difficulty in arranging a fair lineup. Thus, the case is not like *Neil v. Biggers*, 409 U.S. 188 (1972), where the police did have such difficulty. And certainly, the police had enough time to arrange fair identification procedures once they had arrested Mr. Moore; indeed, they could have had a lineup on December 21, 1967, instead of the in-court showup. See Wall, *Eyewitness Identification in Criminal Cases* 52-58. Hence, no

justifications of expediency could have supported the State's choice of a one-man, in-court "showup" in this case, even leaving aside the additional ways in which the prosecutor tainted the "identification."

What does appear from the Record is that the police themselves were not positive of the witness' ability to identify the man they believed was the offender. Marilyn Miller was not willing positively to identify Moore's picture, as that of the assailant. (Tr. 156) It would seem, then, that the police wanted to assure that the witness agreed with *their* choice of James R. Moore as the offender. This is not sufficient justification for a highly suggestive procedure which may result in a case of mistaken identification.

Finally, it was incumbent upon the prosecutor to ensure that the proceedings were fairly conducted. As the only judicial officer present who could have known what the police were doing there that day, it was the State's Attorney's ethical responsibility to minimize the unfairness which inhered in the procedure. Instead, the prosecutor used the situation to his own advantage, thus increasing the imbalance between Petitioner and the State. Pulaski, "*Neil v. Biggers*: The Supreme Court Dismantles The *Wade* Trilogy's Due Process Protection," 26 *Stanford L. R.* 1097 (1973).

Under these circumstances, a finding of a due process denial would seem to be inescapable.

C. The Photographic Identification In Petitioner's Case Was Not An Adequate Independent Origin For The Witness' Identifications.

In a case where the defendant has been subjected to unfair identification procedures, the admissibility of the

identification must be determined by looking to the possibility that the identification had an origin independent of the unfair procedures. *United States v. Wade*, 388 U.S. 218, 241-242 (1967). This is a fact-finding process in which the defense first shows the presence of taint and the prosecution must show, by "clear and convincing evidence" that there is an independent basis for the identification. *Id.* at 242.

In Petitioner's case, the District Judge found that the confrontation procedure was suggestive, but that the witness' ten to fifteen second viewing of her assailant was an adequate independent origin for her identification. (Memorandum of Decision, pp. 9-12) The Court of Appeals, purporting to follow the District Court, held that "the photo spread" was the adequate independent origin, even though the confrontation was suggestive. (Unpublished Order, Pet. App. C, p. 4) However, this photographic "identification" cannot serve as an independent origin because it, too, was tainted by police suggestion.

As this Court has pointed out, photographic identification is a very effective investigatory tool in the modern urban police force. *Simmons v. United States*, 390 U.S. 377 (1968). But it has its drawbacks in terms of inherent suggestivity. While the Chicago police in the instant case relied heavily on the photographic technique, they did not protect sufficiently against its dangers. In cases involving eyewitness identification, there are several danger signals to which courts must be alert; the leading commentator on this subject has described three which are critical in this case. Wall, *Eyewitness Identification in Criminal Cases* 95-122.

First, where the victim of a crime knew the perpetrator before the crime was committed, the victim usually

informs the police of this fact *immediately* upon reporting the crime. Wall, *supra*, 95. In the case at bar, the witness described her assailant to the first police officer on the scene and then to two detectives without ever mentioning that she might have seen him before. It was not until several hours after the crime that she perhaps mentioned the possibility that it was someone she had seen before. Her statement to this effect was never corroborated by any police reports. (Tr. 107)

Secondly, Wall states that witnesses' memories sometimes undergo an "unconscious transference." That is, if a witness has had a limited opportunity to view the police suspect at some time before the crime, but under different circumstances, he/she may recall the suspect's face because it is familiar. The memory would then be of someone other than the actual offender. Wall, *Eyewitness Identification in Criminal Cases* 119-121. Here, the witness had seen Petitioner in a dark bar; hours after she was attacked, she formed the thought that Petitioner and the assailant might be the same man. (Tr. 107)

The third danger signal, also present in this case, is that when the witness and the person identified are of different races, the witness' ability to distinguish the suspect's face from others of that race is substantially reduced. *Id.* at 122. Marilyn Miller is white, James Moore is black, and the man who raped Marilyn Miller was black. These facts militate against the accuracy of the complainant's descriptions and her ability to distinguish between the assailant and any suspects.

Moreover, according to behavioral scientists, once a witness has succumbed to an initial suggestion – whether from mistake or outside sources – there may be no turning back. On the phenomenon of "self-persuasion," it has been said:

> [O]nce a witness' report has been changed according to some minimum inducement and subtle pressure, self-persuasion regarding the truth of statements is likely to occur, and the error may be difficult, if not impossible, to rectify.
>
> And the problem [in police interrogation] is compounded by the fact that repeated questioning is likely to strengthen commitment to a position. (Citations omitted)

Levine and Tapp, "The Psychology of Criminal Identification: The Gap from *Wade* to *Kirby*," 121 U. of Pennsylvania L.R. 1079, 1115-1116 (1973).

In this case, it is evident that there was uncertainty in the witness' mind when she tried to describe her assailant. In fact, her first description of him was hopelessly vague (Tr. 324), and so police filled in the gaps on their own. Quite naturally, as time went on and the police developed their own ideas as to the assailant's identity, the witness' descriptions became more complete and her identifications more certain. (Tr. 105, 107) It is impossible to conclude from these facts that she was not influenced by police and prosecutorial suggestion – subtle or otherwise.

Given the four dangers discussed above and the fact that the members of the jury were never informed of these dangers by way of instructions, one must be wary of the jury's capacity to come to a just conclusion based on the "positive" identification at trial.[5] Considering this set of problems, and the inflammatory

[5] Only the State's Instruction on eyewitness identification went to the jury. (Tr. 625) This Instruction gave no information on the subjects of suggestion and witnesses' susceptibility to it. An appropriate instruction in this case would have been that adopted by the District of Columbia in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), which admonished, *inter alia*, that the government must prove identity beyond a reasonable doubt.

nature of the offense involved, it is impossible to discount the importance of every additional bit of suggestion introduced by the police and prosecution. Wall, *Eyewitness Identification in Criminal Cases* 26; *United States v. Wade*, 388 U.S. 218, 229.

Therefore, the photographic identification procedures used in this case should bear much closer scrutiny than they have received below. Contrary to the factual findings of the Court of Appeals and the District Judge, Marilyn Miller did not select James R. Moore's picture from a single spread of several hundred. There were two different photographic displays in this case. In the first one, police showed the witness some 200 pictures, two days after the incident; she says she selected about 30 pictures of men whose builds were similar to those of her assailant. (Tr. 114) But she identified none of them as the assailant. (Tr. 111)

It was only after the police had decided that Mr. Moore was to be their only suspect in the crime that they included his picture in a greatly-reduced (7 to 12) "spread" of photographs. (Tr. 421) It was at this second viewing that Marilyn Miller apparently responded to police suggestion, by picking out the *only picture of a bearded black man.* (Tr. 157) This Court has commented on such procedures:

> [I]mproper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a *brief glimpse* of a criminal, or may have seen him *under poor conditions* . . . [T]here is some danger . . . [which] will be increased if the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also

> *heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime* (Emphasis added)

Simmons v United States, 390 U.S. 377, 390 (1968).

In the instant case, it is clear that if police had over 200 pictures on a Saturday, and the witness could tell them at that time that thirty of them fit the description of the offender, then they could find at least two or three other suitable photos to include in their spread on the following Monday or Tuesday. But they did not do this; they chose instead to show only one picture which fit the description the witness had given. (Tr. 157) Herein lies the unnecessary suggestiveness of the photographic identification. Thus, the "independent source" relied on by the courts below was itself tainted. The identification procedure in this case began with the vague description of a black assailant, given by a white complainant, to the first policeman on the scene. Later that day, the first description was augmented by the witness' statement that her assailant – who had put on a mask before the attack – had a beard. Still later that day, or perhaps on another day entirely, the witness stated she had seen the bearded assailant the night before she was raped. When the complainant could not make a photographic identification on the first try, the police set up a photographic "display," from which she could not help but pick Moore's picture because it was the only picture of a bearded black man. To shore up the still-tentative identification, the police arranged to have the witness see Moore in person, in court, and without a lawyer. The prosecutor completed the process by implying that Moore had stolen her property after assaulting her.

It is no wonder that with all these suggestive influences, the witness' identifications became more and more positive as time went by – a time during which no other suspects were shown to her. The identification procedure ended, as it inevitably must have, in the witness' absolutely "certain" identification of Moore as the man whose face she would never forget. Therefore, the initial identification was irremediably infected, both by the absence of counsel at the crucial confrontation of December 21, 1967 and by the numerous elements of suggestion which pervaded the entire identification procedure.

D. Exclusion Of The Identification Evidence Was The Appropriate Remedy For The Deprivation of Petitioner's Rights Under The Sixth And Fourteenth Amendments.

In *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), this Court fashioned an exclusionary remedy to remove the taint of counsel-less identification procedures. Finding that mere exclusion of evidence of a counsel-less lineup or "showup" itself would derogate from the right to a fair trial, the Court held that the proper solution was to exclude an in-court identification which actually flowed from the improper confrontation. *Wade, supra*, at 241. Hence, where a counsel-less lineup or "showup" has taken place after the prosecution has begun, the initial identification and subsequent in-court identifications based thereon must be excluded unless the State can show by clear and convincing evidence that an independent basis existed for the identification. *Id.* at 240; *Kirby v. Illinois*, 406 U.S. 682 (1972).

In 1972, this Court decided *Neil v. Biggers*, 409 U.S. 188 (1972), a case which raised a due process challenge to a police station "showup" involving a corporeal and voice identification. This Court held that the identification by the witness was reliable in spite of the unnecessarily suggestive out-of-court identification procedure. *Id.* at 201.

In so holding, the Court indicated that a strict exclusionary rule would not be appropriate for cases arising before June 12, 1967, and employed a "totality of the circumstances" test for the admissibility of identification in these "pre-*Stovall*" cases. *Id.* at 200. But *Neil* by no means foreclosed a strict exclusionary rule as a deterrent to police and prosecutorial improprieties which occurred after June 12, 1967. Hence, there has been a division among the lower courts as to which exclusionary rule does apply to "post-*Stovall*" cases.

One interpretation, exemplified in *Brathwaite v. Manson*, 527 F.2d 363 (2nd Cir. 1975), *cert granted, Manson v. Brathwaite*, ____ U.S. ____, 96 S.Ct. 1737 (1976), is that a strict exclusionary rule should apply to those cases arising after June 12, 1967. The other interpretation, which appears in *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975), *cert. den.*, 421 U.S. 1016 (1975), is that there should be no strict rule of exclusion for such cases, but that each identification should be tested individually for its reliability, under the "totality of circumstances." But even in *Kirby v. Sturges, supra*, the Seventh Circuit recognized that a simple exclusionary rule would be salutary for its deterrent effects and its facility of application; therefore, a strict rule would minimize the danger of convicting the innocent. *Id.* at 405. *See* also, Pulaski, "*Neil v. Biggers*: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection," 26 Stan. L.R. 1097 (1974).

Applying the strict exclusionary rule to Petitioner's case is justified by the fact that police and prosecutors were on notice, in December 1967, that suggestive confrontations were disapproved and that their products would be inadmissible. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 2630 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). That rule would require the exclusion of the first preliminary hearing identification, the second identification at the probable cause hearing, February 5, 1968, and the identification at trial, simply because the State's procedures violated the Sixth and Fourteenth Amendments. *See Brathwaite v. Manson*, 527 F.2d 363, 371 (2nd Cir. 1975), *cert. granted, Manson v. Brathwaite*, ____ U.S. ____, 96 S.Ct. 1737 (1976). *See* also, Grano, "*Kirby, Biggers* and *Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 Mich. L.R. 717 (1974).

The primary purpose of a strict exclusionary rule – deterrence of misbehavior by the State – would obviously be served in the case at bar. The suggestiveness in this case may have been initiated by police alone, but their continuing influence was strenthened by the apparent approval it was given by the State's Attorney on December 21, 1967. The ultimate abuse was the prosecutor's contemporaneous use of the cumulative police suggestion and his own in-court implications, in obtaining an identification. This is the type of State action which can be reached only by means of a broad rule, uniformly applied.

A strict exclusionary rule applied in Petitioner's case would also remove at least part of the substantial risk

of misidentification inherent in such cases. Because the strict rule would protect against the danger of a jury's convicting an innocent person on the basis of unreliable eyewitness testimony, if applied in Petitioner's case it would have minimized the dangers created by the jury's ignorance of the unreliability of eyewitness identification. Thus, there would have been no harm in the judge's failure to thoroughly instruct the jury as to Marilyn Miller's own capacity to identify her assailant.

However, if this Court finds that a strict exclusionary rule is not mandated by the Fourteenth Amendment, then the identification testimony in Petitioner's case remains subject to the "totality of circumstances" test. *Neil v Biggers*, 409 U.S. 188 (1972). Even under this test, Petitioner was entitled to have that testimony excluded.

Shifting the focus from the admittedly improper police/prosecutorial procedures in this case to the reliability of the eyewitness' independent identification, it becomes necessary to examine the possibilities for irreparable misidentification. The facts adduced at the State court trial demonstrate a substantial likelihood that the complainant was led into mistakenly identifying the Petitioner as her assailant, and that the police compounded the error by consistently employing suggestive procedures.

When Marilyn Miller was attacked, she had no more than ten or fifteen seconds to see the assailant. (Tr. 104) This viewing took place in a room which was darkened, apparently, for sleep. (Tr. 101-102) A third significant fact is that the complainant had actually been asleep when she first saw the shape of a man whose body "just filled up" her bedroom doorway (Tr. 213), and who carried a knife, awl, or icepick. (Tr.

212) Moreover, the complainant was white and the assailant was black. (Tr. 125)

Given these conditions, it would be virtually impossible for a reliable identification to emerge. The extremely limited opportunity of a sleep-fogged victim to view the potential perpetrator of a sexual assault is hardly a basis for a positive and accurate description of that assailant. And in the case at bar, it did not produce such a description.

When the first policeman arrived at the complainant's apartment, moments after the rape, Marilyn Miller could not give details about the man's height, weight, voice, or facial features. (Tr. 226) She could only recall the things which impressed her most – his large size and his race. (Tr. 324)

But the Record is silent as to what happened to Marilyn Miller's recollection between that time and several days later when police had settled on Petitioner as their prime suspect. We have Ms. Miller's testimony that she gave police new information about the assailant later on the same day. (Tr. 107) Yet the police never bothered to include this new information in their official report, if in fact they received it. (Tr. 404) One can only speculate, therefore, as to what might have refreshed (or created) the witness' memory, and when that happened.

However, even if we view this situation in the light most favorable to the State, the possibility persists that Marilyn Miller "remembered" Petitioner's fact because it – and not the assailant's – was familiar. As Patrick Wall has pointed out, it is not at all uncommon for a witness unconsciously to substitute a face previously seen for the face of the actual criminal. Wall, *Eyewitness Identification in Criminal Cases* 119-121.

This phenomenon could easily have been responsible for Marilyn Miller's feeling – hours or perhaps days after the crime – that the assailant had been a different large black man. After all, she had seen Petitioner in a bar the night before the attack, and they had spoken only briefly, without exchanging names or addresses. (Tr. 115-118) And, too, she testified that Petitioner's remarks had offended her at that time (Tr. 119); quite probably this left an unpleasant memory of him in her mind. Then when she was raped the next day, it eventually occurred to Ms. Miller that it might have been the same man whose words had disturbed her the night before.

While only experts in mental analysis could resolve the question of "transference" discussed above, Petitioner's alibi evidence at trial lends some weight to it. In this case, the defense turned on the fact that James R. Moore was more than six miles away from the scene of the crime, in the cafeteria of the downtown university where he was a student, at the time Marilyn Miller was raped on Chicago's South Side. (Tr. 473, 384) The alibi witnesses were apparently disinterested persons who were not discredited in any way during cross-examination. (Tr. 473-495) In the face of this evidence and the testimony that the fingerprint found at the scene was not Moore's (Tr. 356), it strains the imagination to accept, untested, the witness' identification of Petitioner as the man she saw for only ten or fifteen seconds in a darkened room.

The procedures actually followed by the police in their use of photographs to identify Petitioner were discussed above, (See pp. 33-39, *supra*.) It is important to recall at this point that the complainant did not make an identification from the first set of pictures she

saw. (Tr. 110) That is, when her memory was its freshest, and presumably not yet affected by any police suggestion, she could not identify an assailant.

But at the next showing of pictures, once police had definitely chosen Petitioner as their only suspect, Marilyn Miller did select his picture. (Tr. 111) Since *no* police photograph shown to the witness was ever marked or noted, there is only the detective's subjective memory on which to rely as a test of the witness' own memory. The two sources contradict each other on all points but one: the Petitioner's photograph was shown and selected. This was probably inevitable; it was the only picture of a bearded black man.

To summarize the "totality of circumstances" which militate against the reliability of the identification in this case:

1. There was only a restricted opportunity to view the actual assailant (10 to 15 seconds in an unlit room).
2. The witness' attention was divided even during that time (she could not describe the man's face, but could describe with some accuracy the weapon he carried), and she was unable to see anything during the attack itself.
3. The witness gave only a very general on-scene description which was capable of fitting innumerable black men.
4. A full week passed between the occurrence and the confrontation on December 21, 1967; the witness saw no other suspects in person during that time.
5. The witness' apparent certainty of her identification at trial cannot be judged without considering the various elements of suggestivity which preceded it in a series of progressively reinforcing instances of police and prosecutorial impropriety.

These circumstances point directly to a substantial likelihood of misidentification. And when they are viewed in light of the evidence presented in Petitioner's defense, it is manifest that inclusion of the identification testimony significantly detracted from his right to a fair trial. For without the seemingly positive identifications which the witness provided in court, a jury could not have found Petitioner guilty beyond a reasonable doubt. Therefore, a proper application of the *Neil v Biggers, supra,* test, would have impelled the Court of Appeals for the Seventh Circuit to find that Petitioner was deprived of due process as a result of the erroneous admission of all identification testimony at the trial. It was error for the Court of Appeals to have found otherwise, and its decision should therefore be reversed.

III.

SINCE PETITIONER WAS DENIED COUNSEL AT AN IMPERMISSIBLY SUGGESTIVE CONFRONTATION WITH THE ONLY ADVERSARIAL EYEWITNESS, IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO DENY APPOINTED COUNSEL FREE TRANSCRIPTS OF THE FIRST PRELIMINARY HEARING, AT WHICH THE CONFRONTATION OCCURRED, AND OF THE SECOND PRELIMINARY HEARING, AT WHICH THE EYEWITNESS IDENTIFIED PETITIONER.

On December 21, 1967, Petitioner appeared in court, where formal charges were read to him, and in the presence of the complaining witness, the State's Attorney volunteered the following remarks:

> "There's further investigation being conducted of prints being found on the scene. This is an allegation of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. *Do you see the man in Court today that committed these acts upon your person*?

Transcript of Proceedings, December 21, 1967. (Emphasis added)

The assertions and implications contained in the State's Attorney's speech in front of the complainant were totally unfounded. The "print" which was found was proven *not* to be that of Petitioner (Tr. 356); this, in a physical assault where there was no indication that the assailant wore gloves. No evidence whatsoever was adduced at trial to indicate either that the "instruments" taken from Moore's home belonged to the witness, or that Moore's clothing had been worn by the assailant. (Tr. 378) But these improper remarks were entered into the record, and deliberately or otherwise, prompted the witness' inevitable indicating of Petitioner as "the man."

Neither before, during, or after the witness testified at trial, did the defense ever see the transcript of this proceeding. (See Affidavit of Frederick Cohn, attached to Petitioner's Reply Memorandum in the District Court.)

On February 5, 1968, this same eyewitness testified at Petitioner's hearing on probable cause, and again

identified Petitioner as her assailant. (Transcript of Proceedings, February 5, 1968, p. 2) This proceeding, too, was transcribed by a court reporter.

On February 14, 1968, Petitioner was indicted by the grand jury, after proceedings in which the complainant made a third identification of Petitioner. (Tr. 241-245) Minutes were taken by a court reporter at that hearing, as well.

It was not until April 5, 1968, that the court appointed Frederick F. Cohn to represent Petitioner at trial (Tr. C-029) When Mr. Cohn made his first request for preliminary hearing transcripts, the trial court denied it at that time but promised to have the transcript available at trial. (Tr. 10) Overruling counsel's argument that this Court's decision in *Roberts v. LaVallee*, 389 U.S. 40 (1967) controlled, the trial judge stated that Illinois law did not entitle an indigent defendant to a free transcript of the preliminary hearing. (Tr. 11) Mr. Cohn made no fewer than three requests for transcripts of all preliminary proceedings, before, during and after the trial. (Tr. 9-11; Tr. 254-260; Tr. 677) The trial court denied all of his requests except that for grand jury minutes (Tr. 254), and neither the court nor the State's Attorney ordered the preliminary hearing transcripts to be prepared for use at trial. (Tr. 255-260) Petitioner was indigent and could not afford to pay for any transcripts himself. (Tr. 10)

The lower courts in this case have uniformly found that the denial to Petitioner's appointed counsel of pre-trial hearing transcripts deprived Petitioner of Equal Protection under the Fourteenth Amendment. However, they have decided that this error was harmless beyond a reasonable doubt, on the grounds that the transcripts

contained nothing of any value to the defense. [See Unpublished Order; Memorandum of Decision; *People v. Moore*, 51 Ill. 2d 79, 281 N.E.2d 294 (1972)]

In 1968, when Petitioner was tried, it was just as true as it is today that inability to pay the costs of defending a prosecution should not deprive a defendant of the capacity to do so. *Gideon v Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Powell v. Alabama*, 287 U.S. 45 (1932). By that time, this Court had specifically held that the denial of a preliminary hearing transcript to an indigent defendant deprived him of Equal Protection:

> Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.

Roberts v. LaVallee, 389 U.S. 40, 42 (1967).

Thus, the lower courts apparently followed the rulings of this Court in determining that denial of free transcripts was a denial of Equal Protection. However, in holding that this denial constituted harmless error, the lower courts failed to consider the impact of the various pretrial hearings, in light of the suggestiveness issue. These records of the events preceding Petitioner's trial were the *only* tools which his belatedly-appointed attorney could have used in an effort to prove the taint of suggestiveness on the previous identifications, and to impeach the sole eyewitness. Thus, the denial of these transcripts constituted a violation of Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment. *United States v Wade*, 388 U.S. 218, 232 (1967); *Powell v Alabama*, 287 U.S. 45, 69 (1932).

The fact that Petitioner did not have a lawyer at his first confrontation with the complainant caused him substantial prejudice, for the several reasons outlined, *supra*, pp. 12-38. The trial court then compounded the prosecution's error in holding a suggestive confrontation: first by not appointing counsel at that time, and later, by not providing the defense a transcript of the proceeding. Under these special circumstances, it was clearly not harmless error for the trial court to have denied Petitioner, an indigent, the right to use the transcript of the December 21, 1967 hearing. *United States v. Wade*, 388 U.S. 218, 236 (1967).

As to the transcript which contained the complainant's sworn testimony (as opposed to her unsworn identification statement of December 21, 1967), Petitioner should have had this document for general impeachment purposes at the trial. As a criminal defense attorney in a case where the eyewitness' credibility was so important, potential impeachment was part of Mr. Cohn's duty to investigate:

> The relationship of effective investigation by the lawyer to competent representation at trial is patent, for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial . . .

American Bar Association Standards for Criminal Justice, *The Defense Function*, §4.1, p. 227 (1971 Approved Draft).

In addition to its value for impeachment, this transcript contained another identification of Petitioner which was arguably tainted by the suggestive showup and suggestive remarks of the prosecutor which preceded it. This Court's holdings in *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 263, demand no less.

At every step in the judicial criminal process in this case, Petitioner faced a confrontation with the one eyewitness against him. Finally, when Petitioner's appointed trial attorney attempted to reconstruct these events, the court kept secret from him all that had gone before. (Tr. 9-11, 254-260) Thus, on the crucial question of identification, Petitioner was consistently deprived of the effective assistance of counsel.

The Seventh Circuit stated that it may not have been important for the resolution of the question of innocence, *per se*, that the complainant had made prior inconsistent statements and that the State's Attorney had made untrue statements. (See Unpub. Order, 7) Even assuming this were true, insofar as there was a substantial likelihood of mistaken identification in this case – as established by the highly suggestive procedures used – it was very important for trial counsel to be able to cross-examine the witness regarding *any* identification made.

In not recognizing this relationship between the ultimate factual issue and the issues on which it turned, the lower courts misperceived the transcripts' significance. Every bit of Marilyn Miller's testimony would have been useful in Petitioner's defense, because the entire case turned on the identification, and the probability of mistaken identification would have rendered impossible a finding of guilt beyond a reasonable doubt. Each time Marilyn Miller identified Petitioner as the assailant, under the reinforcing influence of police and prosecutorial suggestion, she became firmer in her belief that he was the man. Yet, because the suggestion factor also increased as time went on, Petitioner's only weapon was his attorney's ability to test the identification through cross-examination.

This Court has made it clear, time after time, that meaningful cross-examination is the heart of the effective assistance of counsel. *Pointer v Texas*, 380 U.S. 400 (1965); *Davis v Alaska*, 415 U.S. 308 (1974).

In *Pointer, supra*, this Court held that the Sixth Amendment right to confrontation was so fundamental as to be applicable to the States through the Fourteenth Amendment:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.
>
> [T]he decisions of this Court and other courts throughout the years have constantly emphasized the *necessity for cross-examination as a protection for defendants in criminal cases.*

Pointer v. Texas, 380 U.S. 400, 404 (1965). (Emphasis added)

Petitioner was plainly deprived of this protection to the extent that his attorney was not provided with the witness' previous sworn statements and the unsworn statements from which they might have derived. This deprivation violated the Sixth Amendment and the Fourteenth Amendment.

In order for the lower courts to have found the acknowledged constitutional error in the instant case to be harmless beyond a reasonable doubt, they ignored the fact that the harm was not just the failure to provide a transcript to the defense at the trial itself. Contrary to the trial judge's assurance that the preliminary hearing transcript would be available to defense counsel at the trial, the judge never ordered its preparation, even after defense counsel requested it a second time. (Tr. 254-260) This second denial occurred

while counsel was engaged in the cross-examination of Marilyn Miller, the only eyewitness in the case. Thus, counsel, who had relied on the court's promise of the witness' prior statement for use at this very point, was forced to attempt impeachment of a witness whose prior statements he had never even seen. These facts are not consistent with a conclusion of harmless error beyond a reasonable doubt, in this case, where the sole eyewitness' credibility was a crucial matter.

Therefore, the decision of the Court of Appeals for the Seventh Circuit, that the denial of free transcripts to Petitioner was harmless error, is erroneous and should be reversed.

CONCLUSION

For all of the foregoing reasons, it is submitted that the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the dismissal of the petition for a writ of habeas corpus should be reversed, and the writ granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,
Petitioner,

v.

ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. §2254(d):

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia,

shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown

by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

QUESTIONS PRESENTED

Whether the state courts' factual determination that there was an independent basis for the in-court identification is fairly supported by the record?

Whether under the totality of the circumstances, the courtroom identification was reliable even though the prior confrontation may have been suggestive?

Whether the failure to provide transcripts of the preliminary hearing to the petitioner for use at trial was harmless error?

STATEMENT OF THE CASE

The Respondent relies upon the Petitioner's statement of the procedural history of the case, but elects to present a separate statement of facts in order to correct a number of inaccuracies and omissions contained in Petitioner's brief.

On December 14, 1967, at approximately 12:00 noon, Marilyn Miller was raped in her south side Chicago apartment. It was a bright sunny day when she lay down for a nap in her bedroom (R. 209-[illegible] 305). She was fully clothed and asleep on her bed when she was awakened by an intruder standing in the doorway of the bedroom holding a knife (R. 210-211). She looked up and saw a large man whom she later described as a young Negro male over 6 feet tall, very powerful, dark complected and over 200 pounds in weight (R. 228).

The room was illuminated by multiple light sources. Light was coming in through one window of the bedroom, which was partially covered by a torn quilt or blanket, but not so much as to keep no light from entering. Light was also coming in through the second bedroom window, which was covered by a translucent gauze which "wouldn't keep out any light" (R. 304). Light was coming in through two doorways to the bedroom from the living-dining room of the apartment which was illuminated by bright sunlight (R. 304-306).

Marilyn Miller was "extremely alert" when she viewed her attacker as he entered the room (R. 311). She looked directly at him, observing his face and his body, his build and the way he was dressed for 10 to 15 seconds under the lighting conditions just described (R. 211-216). She never took her eyes off him during this time (R. 315).

He then proceeded to attack her. He partially undressed her, threatening her with the knife-like sharp object. He forced her to submit to oral copulation, raped her and then left (R. 214-223).

The assailant left behind a plastic folder resembling a check book or an address book which contained a letter belonging to a person not in any way connected with the victim (R. 223-225), but who was a former girl friend of James Moore (332-340).

Marilyn Miller then called the police. The first officer that arrived obtained a brief description of what had occurred and immediately transported her to Billings Hospital where she was examined. A vaginal smear and a sample taken from her underpants both revealed traces of human spermatozoa (R. 224-229, 373, 375).

Following the examination, Marilyn Miller was interviewed by two police detectives. She told them that the man who had raped her was the same man she had met the previous evening in a nearby restaurant. She had been approached by him and during a conversation he made a number of suggestive remarks which had offended her (R. 235-239).

On the day following the rape, Marilyn Miller viewed approximately 200 photographs from which she chose a number representing individuals of the same physical build as her attacker (R. 230-231). Several days later she was shown 9 to 12 more photos, all of which were male Negroes, several of whom were bearded, and she picked out one or two (R. 232). The defendant was chosen from the last group (R. 232). Miss Miller indicated to the detective that she thought he was the attacker but that she would like to see him in person.

On December 20, 1967, James R. Moore was arrested and he appeared in court the following day for setting bond. He was identified by Miss Miller during that proceeding, and this is the confrontation which is the subject of the current attack.

During examination of the victim by defense counsel at defendant's motion to suppress the pre-trial identification, the following colloquy on that identification took place:

> Q. So it's when you came up and your name was called, did you realize that the person James Moore being brought out was the suspect you were supposed to identify?
>
> A. I knew it was the man. I recognized him. (R. 97).

and again on direct examination at trial:

> Q. Did you know at the time, Marilyn, that he stepped out of that door, that he was James Moore?
>
> A. I knew he was the man who raped me. (R. 234)

and again on cross examination at trial:

> Q. So when Mr. Moore was brought out here, you knew he was the man who they wanted you to look at, is that correct?
>
> MR. TULLY: Objection.
>
> THE COURT: Sustained.
>
> MR. COHN: Did you think he was a stranger to the proceedings?
>
> A. I knew who he was.
>
> • • • •
>
> Q. Did you believe he was a defendant?
>
> A. I knew he was the man who raped me. (R. 284-285)

and again on redirect examination at trial:

> Q. When you saw James Moore come out of that side door in Judge Ryan's chambers, (sic, courtroom) did you recognize him at the time?
>
> A. Yes.
>
> Q. Did you recognize him at that time as the man who raped you on the 14th of December, 1967?
>
> A. Yes. I'd never forget his face.
>
> Q. Are you sure that's the man?
>
> A. I am positive. (R. 308).

ARGUMENT

I.

THE STATE COURTS' FACTUAL DETERMINATION THAT THERE WAS AN INDEPENDENT BASIS FOR THE IN-COURT IDENTIFICATION IS FAIRLY SUPPORTED BY THE RECORD.

In *United States v. Wade,* 388 U.S. 218 (1967) and *Gilbert v. California,* 388 U.S. 263 (1967), this Court held that a post-indictment lineup is a critical stage of a criminal prosecution and that the Sixth and Fourteenth Amendments require the presence of counsel at such a proceeding. That holding was extended in *Kirby v. Illinois,* 406 U.S. 682 (1972), to apply to confrontations occurring at or after the initiation of adversary judicial criminal proceedings. The confrontation in the case at bar occurred after the *Wade* decision, after criminal proceedings had begun and in the absence of an attorney representing the petitioner.[1] Therefore, the petitioner's Sixth Amendment right to counsel may have been violated — as has held each of the four state and federal courts that have considered this case.

The petitioner argues that a per se rule of exclusion

1. The record is somewhat unclear as to whether an adversary criminal proceeding had actually begun at the time James Moore was brought into court on December 21, 1967. This was only hours after his arrest and a complaint had not yet been filed. Marilyn Miller signed a complaint and it was filed at some point that morning, but there is no clear indication that it was prior to the proceeding. We hesitate to concede that this was a "critical stage" of the prosecution because the only accomplishments were the setting of bond and granting a continuance. Further, even if adversary criminal proceedings had begun it would be reasonable to allow the state some time to determine if the defendant was indigent and, if so, to appoint counsel. Despite those reservations, respondent will concede for purposes of this appeal that a **Wade-Gilbert** violation occurred at the proceeding.

applies or should be extended to this case. Under current law it does not apply. In *Wade,* the Court held that a per se exclusionary rule is only appropriately applied where the admissibility of evidence of the questioned confrontation itself in involved. Thus, the initial question is whether the evidence at the trial of this cause was "come at by exploitation of the primary illegality." In the case at bar it was not. Even though the December 21, 1967 confrontation was held without the presence of counsel, there was no later testimony at trial concerning the identification made at that time. Evidence of the confrontation was not later used to buttress Miss Miller's in-court identification.

Under these circumstances, previous holdings of this Court would indicate that a per se rule of exclusion would not apply. In *United States v. Wade, supra,* this Court specifically rejected extension of a per se rule of exclusion to this type of situation, saying:

> "Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a per se rule of exclusion of courtroom identifications would be unjustified." 388 U.S. at 240.

Therefore, if previous pronouncements of this court are followed, the per se exclusionary rule does not apply here.

The next issue is not, as argued by petitioner, whether *United States v. Wade* was violated, but whether, if violated, it affected the fairness of the petitioner's trial. We strongly urge that it did not. In *Wade* this Court found a Sixth Amendment violation but did not reverse, saying:

> "We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations

of the suspect other than the lineup identifications." 388 U.S. at 240.

Thus, where the record shows by clear and convincing evidence that the in-court identification was based upon a source completely separate and apart from the questioned confrontation, the violation of Sixth Amendment rights cannot be said to have affected the verdict and no reversible error has occurred.

In this case, that specific issue was confronted by the courts from the outset. After a lengthy pretrial hearing on a motion to suppress the identification, the trial court initially noted that the requirements of *Wade* and *Gilbert* had been violated. The trial judge, in a lengthy and considered opinion, noted the evidence in detail, considered the applicable law, and specifically held that the in-court identification was not the product of the December 21, 1967 confrontation.

On direct appeal to the Illinois Supreme Court, the facts elicited at trial were reviewed in detail by that court. Considering a multitude of arguments, including that raised here, the court affirmed the conviction, specifically holding that:

> "The record shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph." *People v. Moore,* 51 Ill.2d 79, 281 N.E. 2d 294, 298 (1972).

The United States District Court for the Northern District of Illinois also decided the question. Considering petitioner's habeas corpus petition below, the court reviewed the state court transcript of trial and pre-trial hearings and said:

> "... [I]t is clear that the complaining witness' identification of petitioner at trial had an origin independent of the suggestive proceeding on December 21." p. 14.

Finally, the United States Court of Appeals for the Seventh Circuit considered the same question, reviewed the evidence and came to the same conclusion. Thus, the purely factual issue of whether there was an independent basis for Marilyn Miller's in-court identification has thus far been decided in four courts. Petitioner now seeks to have that factual determination reviewed again.

This court and every federal court is restricted in the extent to which it can review this type of factual issue. Section 2254(d) of Title 28 of the United States Code compels a federal court to presume as correct any determination on the merits of a factual issue made by a state court after a hearing in proceedings to which the applicant for the writ and the state were parties, unless the federal court concludes that such determination is not fairly supported by the record. See *United States ex rel. Harris v. Illinois,* 457 F. 2d 191 (7th Cir. 1972). The finding of an independent basis for the identification in his case is such a factual determination of the merits made by two state courts with the same result. Each of the requirements set out in section 2254(d) are present in this case and therefore the presumption applies unless the record does not support the finding.

The record does fairly support the determination that Marilyn Miller's in-court identification was based upon observations other than the December 21, 1967 confrontation. In making its determination the state court was required to consider those factors set out in *Wade* which would establish that the in-court identification was "come at . . . by means sufficiently distinguishable to be purged of the primary taint." Those factors were considered by the state court. The facts considered were as follows:

On December 13, 1967, the night before the crime, the victim, Marilyn Miller, was approached in a restaurant near her apartment by James Raymond Moore. Moore had several minutes of conversation with Marilyn Miller the gist of which was that Miss Miller's love life was lacking and that he could make up for that lack. Miss Miller was offended by this conversation and the person who initiated it, James Raymond Moore (R. 115-119).

The next day at about noon, in bright sunny weather, an assailant entered Marilyn Miller's apartment and raped her. The room where the attack took place was well lighted. Light streamed in from two doors and two only partially covered windows (R. 304). Miss Miller got a good look at Moore for 10 to 15 seconds as he stood in the doorway with a knife in his hand and entered the room (R. 211-216). She was very alert and never took her eyes off him during this time (R. 311, 315). She was also able to observe all of him but that part of his face between the bridge of his nose and his chin at several other times during the course of the attack (R. 218) and at the time "she was no casual observer, but rather the potential victim of one of the most personally humiliating of all crimes."[2]

Afterwards and in the days that followed, Miss Miller was able to give fairly precise and accurate descriptions of her assailant (R. 150) contrary to what petitioner alleges in his brief. She described the prior meeting with the defendant to the police almost immediately after the rape (R. 155). She tentatively chose Moore's picture out of over 200 shown to her within the next several days, expressing only that she would like to see the individual in person before she could be positive (R. 155). Finally, her identifications at trial and during the motion to sup-

2. As quoted in Neil v. Biggers, 409 U.S. at 200.

press were so positive as to leave no doubt that the allegedly suggestive confrontation was not the basis of that identification (R. 97, 234, 284-285, 308).

This factual situation is clearly an adequate basis for the state court's finding. We call the court's attention to *Coleman v. Alabama,* 399 U.S. 1 (1970), where the witness caught a glimpse in the headlights of a passing car of the face of his assailant as he fled. This was held to be a sufficient independent origin. There are also a large number of Court of Appeals cases in which independent basis was found in factual situations as or less compelling than here. See *United States ex rel. Kirby v. Sturges,* 510 F. 2d 397 (7th Cir. 1975); *United States ex rel. Pierce v. Cannon,* 508 F. 2d 197 (7th Cir. 1974); *United States v. Pigg,* 471 F. 2d 843 (7th Cir. 1973); *United States ex rel. Harris v. Illinois, supra; United States v. Broadhead,* 413 F. 2d 1351 (7th Cir. 1969), *cert. denied,* 369 U.S. 1017; *United States v. Cox,* 428 F. 2d 683 (7th Cir. 1970), *cert. denied,* 400 U.S. 481; *United States ex rel. Frazier v. Henderson,* 464 F. 2d 260 (2d Cir. 1972); *United States ex rel. Phipps v. Follette,* 428 F. 2d 912 (2d Cir. 1970), *cert. denied,* 400 U.S. 908.

The finding of independent basis in this case is factually supported by the state court record and this court is therefore bound to presume its correctness.

II.

UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE COURTROOM IDENTIFICATION WAS RELIABLE EVEN THOUGH THE CONFRONTATION MAY HAVE BEEN SUGGESTIVE.

Petitioner further argues that the confrontation occurring on December 21, 1967 was so unnecessarily suggestive

and conducive to irreparable mistaken identification that he was denied due process of law. Since each of the courts which has considered this case has concluded that the challenged confrontation was suggestive, we do not dispute that conclusion. Respondent does urge, however, that even though the confrontation may have been suggestive, it was the later courtroom identification that was reliable.

In *Stovall v. Denno,* 388 U.S. 293 (1967), this court indicated that the suggestiveness *vel non* of a confrontation was to be decided by a consideration of the "totality of the circumstances." Later decisions have indicated, however, that a finding of suggestiveness does not mechanically lead to exclusion of the in-court identification. In *Simmons v. United States,* 390 U.S. 377 (1968), it was indicated that application of the exclusionary rule depended upon a two-fold showing: First, that the confrontation was conducted utilizing impermissively suggestive procedures and, secondly that, as a result, there was a substantial likelihood of misidentification. Thus, where a suggestive confrontation had occurred, the later in-court identification need not be excluded where it could be ascertained that it had not affected the reliability of the later testimony of trial. Finally, in *Neil v. Biggers,* 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), it was specifically stated that:

> "[T]he central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. at 199.

In this case, Marilyn Miller's in-court trial identification was reliable even though the procedure used at the earlier confrontation may have been suggestive, and this conclusion is fairly supported by the record.

Upon a review of the record, the court will note a number of facts indicating reliability. Contrary to petitioner's

assertions, Miss Miller had an excellent opportunity to view her assailant at the time of the rape.

Although the complainant had been asleep in the bedroom of her apartment, she was awakened by a noise. She then had an opportunity to observe the intruder at close range for ten or fifteen seconds (R. 211-216). The time of the incident was approximately noon and, although there were coverings over the two windows in her room, a significant amount of sunlight filtered into the room from both windows and from the open doorways to adjoining rooms (R. 304-306). The complainant indicated that she was very alert at the time (R. 311). Complainant's positive identification of the petitioner as the intruder was bolstered by the fact that a man she identified as the petitioner had approached her in a bar the night before the incident and had spoken with her at close range for several minutes after approaching her (R. 235-239).

The complainant had given a description of her attacker prior to the suggestive confrontation which described the man as six feet to six feet-two inches, over 200 pounds, dark-complected, and having facial hair around his lips and chin (R. 228). The petitioner's description in the record was six feet-two inches, 240 pounds, and having a beard.

The complainant exhibited a high level of certainty during every corporeal identification of defendant. The only time she hesitated was during a photographic lineup when she picked out one or two photos out of approximately 200 photos shown to her but even then she did pick our petitioner's photo.

Seven days passed between the date of the crime and the date of the suggestive confrontation, but this was not an unduly long delay considering the circumstances surrounding her observations on the day of the crime. The

above facts indicate that the complainant's identification of petitioner at his trial was quite reliable and therefore the suggestive confrontation did not produce a substantial — or even remote — possibility of misidentification.

Section 2254(d) of Title 28 of the United States Code applies to this issue as it does the first. Examination of the record to determine whether this purely factual determination is fairly supported by the record reveals a satisfactory basis. Therefore, the findings of the State courts on this issue are presumptively correct.

III.

THE FAILURE TO PROVIDE TRANSCRIPTS OF THE PRELIMINARY HEARINGS TO THE PETITIONER FOR USE AT TRIAL WAS HARMLESS ERROR.

Petitioner contends that the denial of preliminary hearing transcripts for use as impeachment at trial was a violation of his constitutional rights to equal protection of the laws, due process of law and the effective assistance of counsel. The State and Federal Courts considering this case have all held that the error was harmless beyond a reasonable doubt.

In *Roberts v. LaValle,* 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 41 (1967), the Court reiterated the principle that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. There the rule was specifically applied to access to preliminary hearing transcripts under New York statutes. The Illinois Supreme Court, in this case below, held that under the authority of *Roberts,* the denial of the transcript denied Robert Moore equal protection of the laws. The court concluded, however, that this denial was harmless beyond a reasonable doubt under *Chapman v. California,* 368 U.S.

18 (1967) and *Schneble v. Florida,* 405 U.S. 427 (1972). In making the finding, the court said:

> "We have examined the testimony at the trial, the testimony at the hearing on defendant's motion to suppress the identification of the defendant by the complaining witness, and the transcript of the preliminary hearing, and fail to find any testimony for which the transcript could have been used for purposes of impeachment. Defendant argues that in the hearing to suppress, and at trial, the complaining witness testified the assault occurred shortly after noon and that at the preliminary hearing she testified 'it was night.' Taken out of context that statement might appear to support defendant's contention that there is a discrepancy in her testimony, but read with her other testimony at the preliminary hearing it is obvious she meant her room was darkened because the windows were covered. We conclude that the denial of the transcript was harmless beyond a reasonable doubt." 281 N.E. 2d at 276.

That finding was sustained by both federal courts and is supported by the record. The defense attorney extensively cross-examined Miss Miller at the suppression hearing with regard to the pretrial confrontation. Every conceivable detail was brought out for the judge's consideration. The alleged false statement by the prosecutor in fact was not false but was given for purposes of bond upon the best information available to the State's Attorney. Knowledge of this statement could not have aided counsel in cross examination in view of the independent origin of the identification (see Section I of this Brief), the corroborative evidence and the certainty of Miss Miller's identification.

Since there were no discrepancies between the complaining witnesses testimony at the preliminary hearing, and since there was nothing in the bond hearing transcript which would have later assisted petitioner if he had been

in possession of a copy, failure to provide the transcript was harmless beyond a reasonable doubt.

This finding of harmless error was made both at the trial court level and by the Illinois Supreme Court by reviewing the preliminary hearing transcript and comparing it with the trial court record. Each of the Federal courts below affirmed this purely factual finding. We urge that the record fairly supports the conclusion and that the convictions should therefore be reversed.

CONCLUSION

Each of the three issues presented to this Court were determined at the State court level by a finding of pure fact. Each was affirmed by the lower Federal courts based upon a review of those factual issues. A review of the record by this Court will lead to the conclusion that each of those factual determinations is fairly supported by the record and that the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

UNDER THE RECENT DECISION OF THIS COURT IN *MANSON v. BRATHWAITE*, NO. 75-871, A PER SE EXCLUSIONARY RULE IS NOT APPLICABLE IN THIS CASE DESPITE USE OF EVIDENCE OF SUGGESTIVE IDENTIFICATION AT TRIAL.

The purpose of this supplemental brief is twofold: to correct a factual assertion in Petitioner's brief on the merits that was in error, and to supplement Respondent's

argument in light of this Court's decision in *Manson v. Brathwaite,* No. 75-871, decided June 16, 1977.

In Respondent's brief on the merits, counsel made a factual assertion from the record that was clearly incorrect. In the brief on page 9, it was stated that:

> "Even though the December 21, 1967 confrontation was held without the presence of counsel, there was no later testimony at trial concerning the identification made at that time. Evidence of the confrontation was not later used to buttress Miss Miller's in-court identification."

In light of Miss Miller's testimony at R-234 (A-75), that assertion was in error. It is clear that Miss Miller testified during the State's case-in-chief that she had identified the Petitioner at the December 21, 1967 confrontation. Counsel for the Respondent respectfully requests that the Court take note of that fact and accept his apology for the error.

The fact that evidence of the identification was used at trial, however, does not affect the issues in this case. In *Manson v. Brathwaite,* 21 Cr. L. 3120, this Court recently rejected application of an inflexible per se exclusionary rule to suggestive identifications in favor of the "totality of the circumstances" test of *Stovall v. Denno,* 388 U.S. 293 (1967) and *Neil v. Biggers,* 409 U.S. 188 (1972). In *Manson,* a trained police officer identified the defendant through a single photograph which he viewed several days after the crime and that photo was admitted as evidence at trial. This Court held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."

The decision in the case at bar will not turn on a mechanical application of the exclusionary rule as urged by Petitioner, but upon a determination of the reliability of the in-court identification utilizing the factors set out in *Biggers.*

Those factors are analyzed in Respondent's brief and indicate that the identification was reliable and not violative of Due Process. Respondent respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

QUESTIONS PRESENTED

I. Whether it is improper to give the presumption of correctness to the state courts' finding that Moore was not deprived of the right to counsel, where Petitioner has argued and the Respondent has conceded that Moore was in fact deprived of this federal Constitutional right.

II. Whether the lower courts in this case have failed to apply the prevailing federal Constitutional standards to the facts regarding Petitioner's initial counsel-less confrontation with the sole eyewitness and the prejudice resulting therefrom.

III. Whether the totality of circumstances in this case demonstrate a substantial likelihood of irreparable misidentification, because the sole eyewitness had only ten to fifteen seconds to view her assailant, in a unlit room, when her attention was divided between the assailant's face and the weapon he carried, which viewing resulted in a vague initial description given immediately after the crime.

IV. Whether it was prejudicial error to deny Petitioner's appointed attorney access to the transcripts of the proceedings at which Petitioner was deprived of his Sixth Amendment right to counsel and his Fourteenth Amendment right to fair identification procedures, where this denial precluded the possibility of curing the earlier defects.

ARGUMENT

I.

THE RESPONDENT HAS PROPERLY CONCEDED THAT MOORE'S FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL HAS BEEN VIOLATED; SINCE THE LOWER COURTS FAILED TO FIND THIS VIOLATION, IT IS IMPROPER TO PRESUME THE CORRECTNESS OF THE STATE COURTS' FINDINGS OF FACT AND LAW.

In the opening paragraph of its brief, the Respondent conceded Petitioner's principal argument, namely that James R. Moore was denied his Constitutional right to have counsel present at his initial confrontation with the sole eyewitness against him. But in Petitioner's view, the Respondent has nevertheless mis-stated the applicable law which is involved here, and has obscured and/or omitted many of the facts to which the law must be applied. Thus, this Reply Brief will recall for the Court the actual legal questions which have been raised and which remain vital for consideration.

By conceding the validity of Petitioner's argument that Moore did have the right to counsel at his first preliminary hearing, where he was first confronted by the complainant Marilyn Miller, the Respondent apparently hoped to divert attention from this central issue, and by saying that it had already been decided below, salvage the decision of the Court of Appeals. However, such a result is impossible, since *no* court in the history of this case has ever held that Moore had the right to have counsel present at that hearing. In point of fact, the District Judge held that it was

unnecessary for him to pass on the issue because he had based his decision on other grounds; and the Court of Appeals held – incorrectly – that this Court's opinion in *Kirby v. Illinois*, 406 U.S. 682 (1972) precluded the attachment of the right to counsel for Moore, who had not been indicted. (See Brief for the Petitioner, pp. 14-16). Thus, if only on procedural grounds, the Respondent is patently wrong in its assertion that the right to counsel issue in this case is not viable because "each of the four state and federal courts that have considered this case" has held that there "may have been" a violation of the right to counsel.[1]

Notwithstanding the Respondent's inaccurate reading of the opinions in the lower courts, the right to counsel in criminal proceedings is not the type of issue which can be dismissed lightly under any circumstances. As this Court has recently reaffirmed: "This right, guaranteed by the Sixth and Fourteenth Amendments, is

[1] As for the State courts, the record is not nearly so clear as Respondent avers. The trial judge began his ruling with a statement which revealed his own misconceptions as to the holding and meaning of *United States v. Wade*, 388 U.S. 218 (1967) at Tr. 133, and completed the finding without even once referring to the fact that *Wade* and *Gilbert v. California*, 388 U.S. 263 (1967) guaranteed the right to have counsel present at eyewitness confrontations. (Tr. 134-136).

On appeal, the Illinois Supreme Court rendered an opinion which never even cited the controlling cases of *Wade*, *Gilbert* and *Stovall v. Denno*, 388 U.S. 293 (1967). Thus, it, too, failed to reach the basic issue of Moore's right to counsel.

The State courts purportedly based their decisions on a finding that the confrontation itself was not "suggestive" and yet the two federal courts both found that this "showup" was in fact suggestive. Thus, State findings of law in this case and in all *habeas corpus* cases are far from inviolate.

indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, ____ U.S. ____, 45 L.W. 4287, 4290 (1977). In *Williams, supra*, this Court emphasized once again that the right to have counsel present at critical pre-trial stages is a "vital need" of all defendants who have been formally charged by the State. *Id.* In light of the facts of the case at bar, and this Court's long-standing commitment to the provision of counsel at all adversary stages of the prosecution as expressed again in *Williams, supra*, the Respondent's attempt to remove this central issue from consideration is totally unacceptable.

It appears to bear repeating that this case arose some six months after all states had been put on notice that counsel-less confrontations with eyewitnesses are not Constitutional. Among the reasons for the Court's rulings in *United States v. Wade*, 388 U.S. 218 (1967) was the crucial point that counsel, and only counsel, can protect against unfairness in the confrontation procedure itself, and if any irregularities do occur, the attorney can attack them later. As the Court pointed out, for many defendants, the adjudication of the identification issue ends at this early stage. (See Brief for the Petitioner, p. 27). Thus *Wade*, while first and foremost providing for the protection of the accused's Sixth Amendment rights to counsel and cross-examination, was also designed to preserve the accused's rights to fair procedures, as guaranteed by the Fourteenth Amendment. *Id.* at 226. It would be difficult to imagine a factual situation which illustrates more completely the seriousness of the two dangers which the *Wade* case recognized and sought to protect: Moore was made to appear in court without a lawyer present,

and to be viewed and finally identified by the sole adversarial eyewitness in his case – but only after the prosecutor had made untrue statements about the "evidence" in the case. No one but Moore's own lawyer could have prevented the snow-balling effect of the initial denial of counsel in this case, but even he was later denied the tools with which to repair the damage once it had been done. (See Brief for the Petitioner, pp. 26-30; 46-52).

Under all the circumstances of the case before this Court, therefore, the Respondent is simply wrong in asserting that we are asking the Court merely to review the facts of this case. The exact opposite is true: the Petitioner had properly asked this Court to review the findings of the lower courts which have misapplied or ignored the Court's rulings as to the Constitutional issues raised below; it is the Respondent who wants to dismiss the critical legal issue of the right to counsel. There has never been a dispute as to the facts of this case on *habeas corpus* review; neither party requested an evidentiary hearing in the District Court, and no hearing was conducted.[2] The contest has always been

[2]Petitioner has never questioned the reliability of the *facts* which the Illinois Supreme Court set out in its opinion. Indeed, as was pointed out in the Brief for the Petitioner, pp. 33-38, it was the federal district court which *initiated* the only factual dispute by confusing the two separate photographic viewings, and finding that the complainant selected Moore's picture out of a group of hundreds (A. 34). The Court of Appeals and now the Respondent have perpetuated this misconception, but the Illinois Supreme Court at least was correct in finding that the complainant first saw a group of 200 pictures which did not include Moore's picture, and then saw a second small group of pictures, one of which was Moore's. (A. 7)

over the correct application of federal Constitutional standards to those undisputed facts. It is well-settled that this is the appropriate function of the federal court in *habeas corpus* cases:

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he *may not defer to its findings of law.* It is the district judge's *duty* to apply the applicable federal law to the state court fact findings *independently.* The state conclusions of law may not be given binding weight on habeas.
>
> *Townsend v. Sain,* 372 U.S. 293, 318 (1963). (Emphasis added)

Respondent's assertions that the only issues in this case are factual ones is thus without merit. Furthermore, its reliance on the language of 28 U.S.C. sec. 2254(d) is misplaced, because that portion of the habeas corpus statute runs to purely factual issues. The case at bar does not fall within the purview of sec. 2254(d) simply because there were no factual issues before the District Judge. As this Court explained in a footnote to its landmark decision in this area:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . ." So-called mixed questions of fact and law, which require the applications of a legal standard to the historical-fact determinations, are not facts in this sense.
>
> *Townsend v. Sain,* 372 U.S. 293, footnote 6, at 309-310 (1963) (Citation omitted)

In the District Court, the Court of Appeals, and in this Court, the Petitioner's sole purpose has been to

urge a just resolution of the mixed law-and-fact issues regarding the identification of James R. Moore and by the complaining witness, which resulted in his imprisonment. The raising of these federal Constitutional issues in the federal *habeas* court was the only appropriate recourse, once the available state remedies had been exhausted. It is much too late for the Respondent to make the specious argument that the federal courts, which have had proper jurisdiction over these matters, cannot make the mixed legal and factual findings which they are required to make. This case is rightfully before this Court, which has granted *certiorari* in order to do precisely what the Respondent erroneously claims it may not do (See Brief for Respondent, p. 11), namely, review the legal determinations of the courts below.

The case of *LaVallee v. Delle Rose*, 410 U.S. 690 (1973), is not controlling here because in that case the Court was faced with a situation in which the District Court had made its own findings of fact, having decided the state court's post-appeal hearing on this issue of the voluntariness of Delle Rose's confession had been adequate because the state court had applied the correct legal standards to the facts before it. Thus, the federal district court in the *Delle Rose* case was in a different posture from that of the District Court in the case at bar. Here, the District Judge could rely on an adequate state record for purely factual determinations, but he was still compelled to apply prevailing federal law to these facts, since the Illinois courts had not applied the correct federal standards as set out in *Wade*. (See Footnote 2, *supra*.)

Although the *Delle Rose* case placed the burden on the *habeas* petitioner to establish that the state court

determinations were erroneous, it upheld the guiding principle which this Court had earlier outlined in *Townsend v. Sain*, 372 U.S. 293, 318 (1963). Therefore, if there is any question in this case regarding the applicability of 28 U.S.C. §2254(d), it should be resolved as dictated by *Townsend*, in which the Court defined the federal courts' *obligation* to review the mixed issues of fact and to apply the *federal* law to the facts. Following this rule, it is undeniable that the Illinois courts' findings in Petitioner's case may not be relied upon because they did not even reach most of the federal Constitutional issues, and they misapplied the federal law in those few which were decided.

For all of the foregoing reasons, the Respondent's arguments regarding the issues which remain for this Court to decide must be rejected. Petitioner is entitled to have his rights under the Constitution of the United States adjudicated in this Court, at this time. We respectfully submit that the issue of Moore's right to counsel is a vital Constitutional issue and not simply a question of fact.

II.

THE LOWER COURTS IN THIS CASE HAVE FAILED TO APPLY THE PREVAILING FEDERAL CONSTITUTIONAL STANDARDS TO THE FACTS REGARDING PETITIONER'S INITIAL COUNSEL-LESS CONFRONTATION WITH THE SOLE EYEWITNESS AND THE PREJUDICE RESULTING THEREFROM.

In conceding that James R. Moore was entitled, as a matter of federal Constitutional law, to the presence of

a lawyer at his initial confrontation with the complainant Marilyn Miller, and that as a matter of fact he was deprived of such right to counsel, the Respondent argues that one issue remains in this portion of the case, that of the "independent basis" for Miller's "in-court" identifications. While the Petitioner submits that our argument on this point is adequately presented in the main brief at pp. 26-39, it is necessary to clear up a number of misapprehensions and to correct certain factual errors contained in the Respondent's brief.

The basic flaw in the Respondent's first argument is its continuing insistence that the Constitutional rights delineated by this Court in *United States v. Wade,* 388 U.S. 218 (1967), *Gilbert v. California,* 388 U.S. 263 (1967), and *Stovall v. Denno,* 388 U.S. 293 (1967) are not legal issues but merely factual matters. This initial misconception further reveals a misunderstanding of the principles so plainly and carefully enunciated in those leading cases, and therefore, of the purpose and function of the exclusionary remedy fashioned by this Court. That is, *Wade* and *Gilbert* held that the denial of counsel at a pretrial confrontation required *per se* the exclusion of all testimony which is derived from such an illegal procedure. This means that without any further evidence from the State, testimony regarding the confrontation itself will automatically be excluded at trial. *United States v. Wade,* 388 U.S. 218, 240 (1967).

Since, contrary to Respondent's contention on p. 9 of its brief, Marilyn Miller testified fully as to the December 21, 1967 confrontation, at a bare minimum, all of that testimony should have been excluded. To wit, all of the direct examination testimony which was

brought out by the State (Tr. 232-234), and all of the testimony on cross-examination (Tr. 279-288) should never have been allowed to go before the jury. Because of the violation of Moore's right to counsel, all of that testimony was inadmissible, and yet it was all used against him in the course of the trial. The Respondent's statement that no such testimony existed is therefore factually incorrect.

Respondent goes on in the same paragraph to say that "Evidence of the confrontation was not later used to buttress" the subsequent in-court identifications. This statement is of course a legal conclusion, and not a mere statement of fact. But it, too, is contradicted by the Record in the case. The prosecution's elicitation of the witness' testimony clearly was designed to buttress the later identification which flowed from it. The test established by this Court for the admissibility of in-court identifications, where the Sixth Amendment right to counsel has been violated, shifts the burden of proof from the accused to the State which must then show "by clear and convincing evidence" that the identifications had an origin independent of the illegal confrontation. Here, since the initial deprivation of Petitioner's right to counsel was immediately followed by a highly suggestive "show-up," the State cannot fulfill *Wade's* requirement with the bare statement that the "show-up" did not "buttress" the subsequent identifications.

Even though this Court has recently re-examined the applicability of an exclusionary remedy for identification procedures which are unnecessarily suggestive, it has not departed from the *Wade - Gilbert - Stovall* approach to cases involving the right to counsel. In

Manson v. Brathwaite, ____ U.S. ____, 46 L.W. 81 (1977), decided June 16, 1977, the Court held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post- Stovall confrontations." 46 L.W. 81, 85. But this holding applies only to the Due Process consideration presented by suggestive confrontations, and not to the more basic question of the right to counsel, which the Court reaffirms as going "to the very heart – the "integrity" – of the adversary process." 46 L.W. 81, 85, fn. 14.

In Petitioner's case, the original violation was the denial of counsel, to which the *Wade* exclusionary rule must apply. The resulting suggestive confrontation only serves to emphasize the fundamental need for counsel at that point, especially since the initial identification could not have been reliable. (See Argument III, *Infra.*)

Because of the contemporaneity of the initial illegality of its "fruit" (the suggestive procedure), it is unrealistic to argue, as the Respondent has, that this Court should accept as binding the ruling of the Cook County judge who did not even articulate the *Wade* rule.

Moreover, it does not help the Respondent's position in this case, on *habeas corpus* review, to rely on the Illinois Supreme Court's determination that there was "sufficient basis" for the in-court identification, since that court clearly stated that the show-up "confirmed" the "photographic identification" (See Brief for Respondent, p. 10). It could not be more apparent that the Illinois courts in this case were not following this Court's reasoning in *Wade, Gilbert* and *Stovall,* since a finding of independent origin is wholly inconsistent

with a finding that *confirmation* or reinforcement is a legitimate consequence of a counsel-less confrontation. The very ingenuousness of the Illinois court's fact-finding of "confirmation" in a suggestiveness case reveals that the court was applying a totally improper standard. Hence, once again, the Petitioner challenges the State court's erroneous conclusion of *law,* rather than its findings of *fact.*[3]

Finally, with respect to the ultimate issue of whether the original opportunity of Marilyn Miller to view her assailant at the time of the crime provided an adequate "independent basis," it is important to note two things. The first is that, contrary to the implications on p. 12 of the Respondent's brief, it is that initial viewing alone which must be examined for the presence of an independent source for the identification. *Gilbert v. California,* 388 U.S. 263, 272 (1967). For, as we have argued in the Petitioner's brief at pp. 33-46, elements of suggestivity began to enter this case as early as the third or fourth police interview with the witness; included in this process was the second photographic viewing on which the Court of Appeals rested its finding of independent basis. It is not possible to treat this case as if there had been a number of discrete counsel-less confrontations which did not influence each other or the witness' recollections. Thus, Respondent's contention that the witness' later identifications should

[3] It should be noted, however, that Petitioner does not accept the lower courts' characterization of the witness' photographic viewings as an "identification" since she failed to select any one picture the first time, and her selection of Moore's picture was only tentative the second time. (A. 63, 68).

be trusted because they appeared to be so positive is illogical.

The second point which must be made regarding the "independent basis" issue is that, although it is definitely a mixed issue of fact and law, many of the Respondent's statements on pp. 12 and 13 of its brief are not "facts." Without re-arguing the facts and their Constitutional signficance, as we have presented them in the Brief for the Petitioner at pp. 33-52, we wish to point out the following: nothing in the record supports Respondent's allegation that December 14, 1967 was a "bright sunny day." (Brief for Respondent, pp. 4, 12; *compare* Appendix, p. 69.) Nor was the victim's room "well-lighted" from "multiple light sources." (Brief for Respondent, pp. 4, 12; *compare* Appendix, pp. 60, 69.) At no point in her testimony did Marilyn Miller ever say that she had a "good look" at her assailant. (Brief for Respondent, p. 12; *compare* Appendix, pp. 60-61.)

Furthermore, it is definitely not true that Marilyn Miller told the police, "almost immediately after the rape," that she had seen James R. Moore previously. (Brief for Respondent, p. 12). At the Motion to Suppress and at the Trial, all three police officers testified to the contrary. The witness never said this to the first officer on the scene. (A. 80) In fact, the record indicates that the State's witnesses were in disagreement as to whether Marilyn Miller mentioned the Smedley's incident to the other two officers much later that day or in subsequent interviews. (Tr. 164)

Finally, the apparently "positive" identification which Miller made in court took place some seven months after the rape and the suggestive identification procedures had occurred; by that late date, "positive-

ness" and "certainty" were inevitable. The facts going to the initial opportunity to view the assailant in this case therefore make out a very poor case for establishing "by clear and convincing evidence" that the viewing provided a strong enough basis for removing the taint of the supervening illegal confrontation.

Because the Respondent has failed to meet its burden in demonstrating that there was an adequate independent basis for any or all of the identification testimony in Petitioner's case, this Court should apply the rulings of *Wade* and *Gilbert* so as to exclude all such identification testimony entered against the Petitioner at trial.

III.

THE TOTALITY OF CIRCUMSTANCES IN THIS CASE DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION BECAUSE THE SOLE EYEWITNESS HAD ONLY TEN TO FIFTEEN SECONDS TO VIEW HER ASSAILANT, IN AN UNLIT ROOM, WHEN HER ATTENTION WAS DIVIDED BETWEEN THE ASSAILANT'S FACE AND THE WEAPON HE CARRIED, WHICH VIEWING RESULTED IN A VAGUE DESCRIPTION GIVEN IMMEDIATELY AFTER THE CRIME.

In Argument II of its brief, the Respondent attempts to show that the highly suggestive, one-on-one, counselless confrontation to which James R. Moore was subjected, did not affect the reliability of Marilyn

Miller's identification testimony. The argument alleges that there are "a number of facts indicating reliability." (Brief for Respondent, p. 14) However, many of these "facts" are not in the Record, and those which are in the Record plainly show *unreliability*. Since this point has been covered in the Petitioner's brief at pp. 26-45, it is only necessary to present here a review of the "totality of circumstances" as they appear from the trial testimony.

Marilyn Miller, the complainant in this case, was raped in her apartment by a large black man who carried a knife, awl or icepick, and a bandana with which he covered his face some ten to fifteen seconds after Marilyn Miller first noticed him. (A. 61, 71) The complainant had been asleep in her bedroom, with no artificial lighting, and with the windows closed. (A. 79-80) The rape occurred at about noon on December 14, 1967. (A. 50)

Meanwhile, James R. Moore, the accused, was in the cafeteria of Roosevelt University, which is at least six (6) miles from the complainant's apartment, at about noon on December 14, 1967. (Tr. 384, 473)

Marilyn Miller's first interview with the police took place a few minutes after the rape; at that time, she could recall only that the assailant had been large and black, and had worn a yellow sweater. (Tr. 324) She gave no details at all regarding his height, weight, facial features, or voice. (A. 85) It is hardly surprising that this initial description was so vague, given that her only opportunity to see the assailant had been for a few seconds, across a darkened room, when she had been awakened from a nap.

The surprising aspect of this identification problem is that Marilyn Miller's later descriptions were more detailed, and that her subsequent identifications became increasingly positive, even though the incident itself had become more and more remote. There is no legitimate reason for this to have occurred, because as a rule, memories which are unaided by suggestion or mistake do not become stronger. But it has been well-documented that once suggestion, however subtle or unintentional, is introduced, then an eyewitness becomes ever more "positive" of his/her identification. *United States v. Wade*, 388 U.S. 218, 235 (1967).

Thus it is quite evident that Marilyn Miller's delayed "recollection" of James R. Moore's face, occurring only after the police had interviewed her several times, was surely the product of some form of suggestion. No other explanation of this problem makes sense, especially in view of the Record evidence that: 1) Moore's credible alibi witnesses placed him 6 miles from the scene (Tr. 473); 2) the one fingerprint found at the scene was *not* Moore's (Tr. 356); and 3) Moore had lost the small book which Marilyn Miller found in her apartment, on the same night that they had met in Smedley's bar. (Tr. 505-506) Hence, even the State's "corroborating" evidence (the presence of Moore's book in Miller's apartment) has a reasonable explanation which casts considerable doubt on the eyewitness' reliability; she herself might have mistakenly picked up the book at Smedley's, thinking it was her own checkbook. When one looks at *all* of the circumstances regarding the identification in this case, it is impossible to accept without question the reliability of the sole eyewitness' testimony that Moore was "the man."

Finally, it must be remembered that there was no point in this case at which the eyewitness herself was not susceptible to suggestion, and that the police did introduce such elements of suggestion in the several means of identification which they employed. (See Brief for Petitioner, pp. 26-39). Under these circumstances, it was error for the Court of Appeals to find that the identification was reliable in spite of the unnecessary suggestivity of the confrontation proceeding, and its decision should be reversed.

IV.

IT WAS PREJUDICIAL ERROR TO DENY PETITIONER'S APPOINTED ATTORNEY ACCESS TO THE TRANSCRIPT OF THE PROCEEDINGS AT WHICH PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FOURTEENTH AMENDMENT RIGHT TO FAIR IDENTIFICATION PROCEDURES, BECAUSE THIS DENIAL PRECLUDED THE POSSIBILITY OF CURING THE EARLIER DEFECTS.

It is no longer disputed that James R. Moore was deprived of his right to have counsel present at the admittedly suggestive "show-up" where he was first presented to the witness. (See Brief for Respondent, pp. 8, 14). It is also undeniable that this suggestive and counsel-less confrontation took place in court, and that the words spoken in that courtroom are a matter of public record. (A. 48) Therefore, it is manifest that possession of the transcript which contained the best

evidence of the illegalities was essential for raising a successful challenge to the procedures.

For this and all the reasons presented at pp. 46-52 of the Brief for the Petitioner, Petitioner suffered severe prejudice due to the trial judge's refusal to supply his belatedly-appointed attorney with free transcripts of the preliminary hearings. Therefore, the Court of Appeals' reliance on the Illinois Supreme Court's determination that denial of the transcripts was harmless beyond a reasonable doubt is in error.

CONCLUSION

Because James R: Moore was deprived of counsel at his first confrontation with the eyewitness, which deprivation led to an impermissibly suggestive one-on-one "showup," and appointed trial counsel was later denied the transcript of this critical proceeding, in a case where the eyewitness' testimony was the only evidence which could support a guilty verdict, it was reversible error for the Illinois trial court to admit the identification testimony which flowed from the unconstitutional confrontation. Therefore, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the dismissal of Moore's petition for writ of habeas corpus be reversed, and the writ granted.

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